

*J. Zennings*

THE  
OFFICE AND DUTY  
OF  
EXECUTORS :

Directing

TESTATORS, in making of  
their Wills; EXECUTORS, in  
the due execution of their Office;

And CREDITORS,  
in the recovery of their

Debts, according  
to Law

With other particulars very use-  
full, profitable and behoovefull for all  
Persons, be they either Executors,  
Creditors or Debtors.

Compiled out of the body of the Common-  
Law, with mention of such Statutes  
as are incident hereunto.

*by Justice Doderidge*

*The second Edition, Corrected and Amended.*

LONDON,

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of the Assignes of John Moore Esquire. 1641.



Josephi Stevens  
Donum. Amici meo Jui Remuig  
Jurispiriti 1710

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Ben. Gamoling



## The Preface.



Midst the Readers of these discourses ; some, not yet un-friendly , may ask, per-

haps, Quorsum hæc, or Quorsum sic : Why have wee a treatise and discourse legall ? Or Why in English , and not rather in the Law-Language ? To whom, yea , also to others , perhaps lesse inquisitive , it will be,

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as I thinke , a thing not unpleasing to heare some reason rendred why I have set my head and hands to this worke , so little in use with those of our profession ; why also in English rather than in the language wherein our volumes of Law are, for the most part , and well-nigh wholly written.

First, for the matter, viz. my thus commenting or making a Treatate upon a legall theme.

I. I have long and strongly conceived, That the more Nobles, Gentlemen and others, shall be acquainted with the Law of the Land, and the justnesse , equity, prudence & providence thereof, the more they will love and affect it ;

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it; *Ignoti nulla cupido*, the want of knowledge of it, causeth the leannesse of love to it. Therefore, to bring Nobles and Gentlemen into acquaintance with the Law, is a meane as well to advance it in their estimation, as to advantage them by it.

I have longthought, that we who are the Professors of our Law, have beene more wanting to it, than the Civilians and Canonists to theirs, who have written very many volumes: *Spartam quam nactus es, hanc exorna* hath been said of old, & should be assayed anew.

More wanting, than others before us of our own profession, have we also been, as I thinke :

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*yet as of old, Britton, Glanvill, Bracton, besides not printed, Fleta and Ingham, did leade the way; so since, Master Littleton; and more lately, Syr Germin Perkins, Fitzherbert, Stanford, Crompton, Lambert, Kitchen, Syr Henry Finch, Dalton, have troden this path, so as it cannot be taxed with novelty or singularity. I mention not relaters or reporters of Judgements and resolutions, nor meere abridgers, nor Authors of books of Entries, expressing forms of Declarations and Pleadings,, &c. Because these have troden another, though for the Students & Professors of the Law, a very profitable Path.*

*Th*

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*The tax and increpation of* 4  
*our late learned and judicious* K. James  
*Soveraigne upon us the Profes-* in his Pre-  
*sors of the English Law, as bee-* face oo his  
*ing wholly in effect addicted to* Book a-  
*our owne privat gaine and ad-* gainst To-  
*vantage, with neglect of the* bacco.  
*publique, had some strong opera-*  
*tion upon me, howsoever upon o-*  
*thers; setting for divers yeeres*  
*past my pen on worke, especially*  
*in Summer vacations, upon di-*  
*vers particular subjects, where-*  
*of this is one and the first born.*

*To this I may add the Crowns* 5.  
*expectation of somewhat legall, to*  
*be published and set forth from*  
*time to time, as appeares by the*  
*speciall Patents successively*  
*granted, and renued for the sole*

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printing of books of Law. There is one such in force at this present, and another long hath been in remainder and expectancy to take effect upon the expiration thereof.

6. And now to adjoyn sic to hæc, viz. the reason of my English writing, to that of my writing upon a Law-theme. First, receive the said late kings judgement touching both, expressed in one of his speeches printed, thus. I wish, saith he, the Law written in our vulgar Language; for now it is in an old, mixt and corrupt language, only understood by Lawyers, whereas every Subject ought to understand the Law under which hee lives, &c.

March,  
1609.

Note.

Here-

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Herein, Andrew Horne, one 7.  
sometimes of our profession, ag- In his  
greeeth with the said late king, Mirror of  
saying, *Abusio est que les le-* Justice.  
*ges ovesque lour enchesons,*  
*ne soient sceus & conus del*  
*touts . It is an abuse, saith he,*  
*that the Lawes with their*  
*grounds bee not knowne by all.*  
*Ergo, to bee in a tongue under-*  
*stood by all.*

More plainly and fully doth 8.  
that our both well learned and  
well discended S<sup>r</sup>. German, sing  
in consort with our said late sci-  
entious king. For, he first brings Li. I. c. 24.  
in the Doctor of Divinity, say-  
ing, that henceforth hee would  
take more paines then before hee  
had done, to know the Lawes of  
Eng-



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*England; for that knowledge is Multum necessaria & clericis & laicis, inò omnibus in hoc Regno commorantibus, etiam in foro conscientia. And this being in his first booke written in Latine : After, writing his second booke in English, he expresseth that he so did for this reason, viz. To the end that it might be understood by all.*

9. *Which of us hath not heard it objected, that we the professors of the Law, seek to hide and secrete the knowledge thereof under this darke and distasted language wherein the Law is for the most part written; not that I hold it any just excuse for the nesience or negligence of any, that*  
our

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our bookes are not in English. Since, first, it were easie for any diligent and intelligent man, specially if acquainted with the right French language, to understand our broken or brackish French in a few dayes. Secondly, there be both statutes and some other Law-bookes in English, which are neglected by the most. Thirdly, though care hath been in Parliament in Edward <sup>36. Ed 3.</sup> the third his time, that Lawyers <sup>c. 15.</sup> should plead, that is, argue and debate causes in English, which was often desired by the Nobles and Commons, till at last assented and enacted; and in Queen Mari-  
ries time care was taken, that the Commissions of Purveyors <sup>2 & 3. Phil. & Mar. c. 6</sup> should <sup>in fine.</sup>

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should be in English, to the end that all Subjects from or of whom they would take, might both see the to be persons authorised, and so also in what manner they are directed to use their authority, according to the Princes pious and princely care that his Subjects should not be abused by his Officers: Yet for this affaire, of having all the Law-volumes speake English, I have not heard nor read of any desire nor endeavour in Parliament. Fourthly, If the Annals and Reports were in English, they are so replete with debates about formes of Writs, Returnes, Pleadings, Essoignes, Imparlances, Protections, Vouchers, Aydpriers and Coun-

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Counterplees of both, and the like, as would easily distaste and discourage any, not intending to professe and practise the law, from versing much in them, or passing through them. This therefore, as I thinke, would not much effect the expressed desire.

The thing in my judgement fit and fruitfull to produce that good effect, would be to have extracts of materials of the law; and that not without some good choice and selection, composed in way of discourse, or tractate expository, and that in English.

I cannot well see or comprehend how any one legall point or theme may be more usefull to and for the generality of men, and  
con-

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consequently more generally expectible and wished for, than the Office of Executors. For who almost is there, who either is not, or may not be an Executor or Administrator ; or at least hath not, or may not have to doe with them, either to receive from them, or to pay to them debts or legacies. Or who is there above *Forma pauperis*, that may not be a Testator, or Will-maker : to the guidance of whom, even in the choyce of his Executors, and contrivance of his Will, it cannot but be materiall to know the office and duty, the right and interest, the power & authority of Executors, yea, of each one Executor where there be divers; yea,

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to know who may be made an Executor, who not; who can make one, who not; how he may be fashioned, generally or specially; what shall come to him, and what cannot be given from him; yea, what goods or chattels shall goe from him, though not given from him. Besides the knowledge, for those others necessary, of the safest wards or locks for Executors: Their Scilla and Charibdis, and the best advantage for Creditors, &c. towards or against them. To me, considering what parts of law were most be-hovefull to be communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I  
gave

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*gave it the first & leading place. Thus my owne thoughts. But how farre this discourse may be profitable to any, and to how many, aliorum fit judicium. How many know no more of these than of the way of a ship upon the sea.*

12.

*Lastly, these are not intended for the learned of our Profession, who have drawn, or can draw out of the same fountaine which I did, and so need not my helpe; but for their sakes who are not professors of the law: yet so as if any young Students may in any part receiue fruit by my labour, I shall not grudge or repine at their so doing. Bonum quò communius eò melius.*

THE



# THE OFFICE OF AN EXECUTOR.



HE things confide- *Introduction.*  
rable touching Exe-  
cutors may all, in  
effect, be reduced to  
these three heads, viz.

1. Their *Being*.
2. Their *Having*.
3. Their *Doing*.

By the first I intend their  
Creation or constitution, with  
the incidents thereto. By the  
second, their interest, fruition, or  
possession. By the third, their  
managing and execution of their  
A Office.



## The Office of

**Office.** This last was and is the thing principally in my intention, and chiefe aime of this Discourse, but necessarily it must have some *Ingredients*, some *Incomitants*, and some *Consequents*, as he that travelleth from *London* to *Torke* to speak with *J. S.* must needs passe by and through other Towns and Villages, and speake with diverse other persons in his journey and returne. To come first to the first; therein wee will consider these three things.

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### CHAP. I.

**1** **W** Hether an Executor and Will be such relatives that one cannot be without the other and therein of the severall kinds of Wils.

**2** How and in what words, an Executor may be made and created

**3** How he may be in speciall man

ner, different from the generall,  
fashioned, limited or qualified.

4 *Who may make, or be made an Ex-  
ecutor, who not ?*

5 *What one may give or bequeath by  
Will, what not ?*

6 *How a Will or Executor shall be  
unmade, and what shall amount  
thereto, viz. a Revocation totall  
or partiall, what to new publi-  
cation.*

*Of the Relation between a Will and  
an Executor.*



**A**S to the first, the ve-  
ry name of Execu-  
tor purporteth in  
generall one to exe-  
cute somewhat, or  
to whom the ex-  
ecution of somewhat is commit-  
ted or recommended : In one parti-  
cular therefore, an Executor of a Will  
must needs be such a one to whom  
the execution and performance of an  
other mans Will after his death is  
commended or committed; Or who is

## The Office of

constituted or authorized by the Willmaker to doe him that friendly office. Hence it followeth necessarily, that a Will is the onely Bed where an Executor can be begotten, or conceived ; for where no Will is, there can be no Executor , and this so conspicuous and evident to every slow capacity, that it needs no prooffe or illustration. On the other side, though much may be written in the name of a Will : Many Legacies bequeathed, and many things appointed to be done, yet if no Executor be named, there is no Will ; for these two be so relative, and reciprocall as that one cannot bee without the other ; if no Will, no Executor ; if no Executor, no Will: yet here are two Cautions to be affixed. That a mans Minde, Will, and intent, touching the disposition of his goods being declared, although for want of naming an Executor, hee dye Intestate, so as Administration is to be committed, yet for that here is not only an Inchoation, or inception of a Testament: but so farre a progression therein, as *testatio mentis*, that is, the manifestation

*Flow. Com. 185.  
a Woodw. &  
Darcies case, so  
expressely said.*

*Testamentum  
quasi testatio  
mentis.*

tion of the minde of the party deceased, and owner of goods; therefore this minde and intention of the intestate being notified and made known to the Judge, who is to commit Administration, is usually annexed (as I take it) to the letters of Administration; and meet so to be for a direction, for and to the Administrator, aswell as the Will, full and perfectly made, but refused to be proved by the Executor, which is usuall. An other Caution is, where a man seized of land in Fee simple, disposeth the same, or part thereof, by his Will in writing; this standeth good for the whole, according to the difference of the tenure, although no Executor be named: So as the party dieth intestate, and Administration is to be committed as touching his goods, and yet hath a Will as touching his Lands. This may seeme strange, but the reason thereof is an act of Parliament, inabling to dispose of Land by Will in writing: And for that Land is not properly testamentary, neither hath the Executor (if any be) any thing to doe or intermedle therewith, and

therefore as the making, or not making of an Executor, nothing pertinent to the validity, or invalidity of this devise or disposition of Lands by Will. So as where there is not *Testatio mentis*, there is not *Testamentum*, yet may there be the first without the later. Having now seen, the bequests of Legacies, without making of Executors doth not amount to a Will; Let us now consider what is the sole making of Executors in the name of a Will, without giving any Legacy or appointing any thing to be done by Executors. Whether I say, this be or amount unto a Will, or not, since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executors, whose office is, as hath been said, to execute the minde, will, and intent of their Testator; and, *Ubi non est testatio mentis non est Testamentum*, saith the Canonists; for answer hereunto confessing that indeed to be that office of an Executor, I yet conceive confidently that in the case above put, there is a good Will and as a Will it is to be proved and approved, for these reasons.

*Sum. Silv. fo.*  
32. b.

sons. First for that the maine part and principall part of an Executors office, and that concerns the soule of a Testator (as our bookes speak) is the payment of his debts; now who knows not that the very making of an Executor is the constituting of such a person who is to pay all debts? and for that cause and end is principally to have & enjoy all the goods and chattels of the testators and all summes, of money to him owing: so as the naming of *A.* and *B.* Executors, is by implication a gift or donation unto them of all the goods and chattels, credits and personall estate of the testator, and the laying upon them an Obligation to pay all his debts, and making them subject to every mans action for the same. And if the Law speake thus much, since *Quod necessarie subintelligitur non deest*, what need then the party expresse it in his Will? If he had willed more then this, as to have given this or that in way of Legacy, it had been needfull for him so to have set down in his will, but there is no meer necessity that every man should give Legacies in his Will, the estates of ma-

ny will not doe more then pay their debts, not oftentimes doe so much, so as if they should give any Legacies, it must be a dead, and a voyd gift. And suppose a man hath much more, and intendeth all to his wife, brother or sister, or other friend, his debts being by such persons paid, since the very making of the party Executor without any more, amounteth to thus much and effecteth this, what needeth then more words? *Frustra fit per plura quod fieri potest per pauciora*; as we often speake touching legall passages, it is needlesse to write foure times, where two be sufficient. Nor is *testatio mentis* here wanting, since the Testator hath made known, who shall have the Administration of his goods for payment of his debts: and it is to be presumed, he had no more special Will, since he did not declare more, and left his Executors farther to have and to doe: *prout lex postulat*. And who can say, here is nothing to execute? Is the suing for, and collecting of Debts due to the Testator, and paying of Debts by him, nothing? Nay it is *in hoc negotio* the u-

*num necessarium.* Besides, the making of an Executor is a designment of a person to be the testators Assignee, to whom and by whom divers things may be feasible by vertue of Covenants, Bonds or other Assurances, as after where we come to shew how the Executor represents the person of the Testator, will appeare: Also of one who, as our bookes often speake, is to dispose the Testators goods for the best advantage of his Soule; but instead of that, since as the tree falleth so it will lye or rest: I will say, as is most for the honor and reputation of the Testator.

*Of the kinde of Wills.*

**N**OW Wills are of two kinds, 4. Hen. 6. 10. Nor may be two waies made: viz. E. 4. 1. If it be Either by writing or nuncupative, that is, by words not put in writing during the Testators life: for after the Testators death, this verball Will must be reduced to writing, and have the Scale of the Ordinary or Judge spirituall thereto affixed: and then it is as effectuell, and of as good validity

4. Hen. 6. 10.  
E. 4. 1. If it be  
written and  
brought to, and  
approved by the  
Testator, in his  
life, it is a Will  
in writing.

as



14.H. 6.5. vid.

5.H.5.1.M.15.

E 16. Eliz.

as if it had been inwriting in the testator's life time; and so doth the Common-Law allow & approve thereof.

But I advise all to make Will by writing, and not to leave to the doubtfull and slippery memory of witnesses. For as of Leases paroll hath been said, That they be Leases perjured, or of perjury: so of Will paroll may be feared. Besides, many times a man doth speake or declare this or that as part of his Will, which his wife, childe, or friend dissuading he letteth that purpose and part of Will to fall and departs from it: yet Witnesses wishing it to stand, will perhaps affirme it as part of the Will. As for a Will-gift and disposition of land of inheritance, if it be not fully written before the death of the Testator, or done so farre (at least) as concerns the disposition of lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and Chattels, it may: yet if it be written before the death of the Testator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that

at not only for Land, as the case re- 6. Ed. 6. Dy. 32.  
 lved in K. Ed. 6. his time was, but  
 so for Goods and Chattels, so as  
 ere be an Executor named : But  
 whether shall we say this is a Will  
 ncupative or in writing, and not  
 ly verball, though it want subscri-  
 ing? for we know that many cannot  
 rite their names, but only markes,  
 and what is that? Nay, suppose one  
 ant hands and cannot write so  
 uch as his name, yet doubtlesse this  
 an may make a Will in writing, it  
 ing written by his direction, as his  
 Will which he dictated; nor is the  
 bscribing of the name of the maker  
 y essentiall part of a Deede, much  
 e of a Will, which needs not sea-  
 ing as a Deed doth. Now put we  
 e case on the other side, that many  
 equests, or Legacies be named in a  
 Will, and many things expressed to  
 e done, and no Executor is named  
 the writing, onely by word of  
 outh A. and B. be named Executors:  
 his I thinke confidently is no Will  
 writing but nuncupative onely, for  
 at one essentiall part of the Will,  
 z. making of Executors is wanting  
 in

in the writing: Nay, the pointing him Executor who is named in the note left with *A. B.* is no sufficient making of an Executor, saith the *Summist*. And of such nuncupation

*Tir. de Testam.*

*Sum. filv. f. 443. b.*

If he survive  
and live a long  
time, not causing  
to be writ or at-  
tested by wit-  
nesses, we think  
it should not  
stand as his  
will.

*Id. supra. fo.*  
*444. b.*

*Wils*, *M. Perkins* reasonably say that it properly hath place, when one suddenly taken with sickness violent, dares not stay the writing of his will; for feare of prevention by death: and therefore prays the Curate and others to witness his Will is. To this Will not written there must be seven witnesses, as such as come not by chance, but especially called for that purpose saith the *Summist*.

*What shall amount to a making of an Executor, or what words requisite thereunto.*

**H**AVING before made to appear that the being of an Executor, is an essentiall part of a Will, and so esse, and not *de bene esse*, only of a Will and Testament; Let us now see First, By what words an Executor may be made. Secondly, *De modo*,

wh

that manner it may be done, how the power and authoritie of Executors may be limited and divided. As to the first, though one doe expressly by Will name or appoint any to be executor, yet if by any word or circumlocution he recommend or commit to one or more the charge and office, which pertains to an Executor, it amounteth to as much as the ordaining or constituting of him or them to be Executors: As if hee declare by his Will, that *A.B.* shall have his goods after his death, to pay his debts, and otherwise to dispose at his pleasure, or to that effect. By this is *A.B.* made Executor, as was conceived by the Judges in the late Queens time, and long before, that it was held, That if one doe will only that *A.B.* shall have the Administration of goods, he is thereby made Executor: yea, in the said late Queens time, one giving divers Legacies, and then appointing that his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his Will, by this without more, was she

*no* *Q*  
*not*  
If *A. B.* be made Executor, and to him and *D.* goods are devised to be disposed for his soul; *D.* is by this an Executor for theirs.

39. H. 6.

Dy. 290.

M. 15. & 16.

Eliz.

21. H. 6. 6, 7.

an Executor, as was held by three justices. (*Viz.*) *Manwood*, *Bret* and *Mounson*, in the Lord Dancet's absence. And so also where an Infant was made Executor, and *A. & B.* Overseers, with this condition, That they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the Infant; by this were they held to be Executors in this meane time. About if *A.* be made Executor, and the testator after in his Will expresth that *B.* shall administer also with him, in ayde of him; here *B.* is an Executor as well as *A.* and if *A.* refuse, alone may prove the Will, as Executor, notwithstanding it be onely said he shall administer with *A.* and in ayde of him: thus many wayes, and by divers words of implication one may be made Executor, although not expressly named by the Will. But if *A.* be made an Executor, and *B.* a Coadjutor, without more, he is not by the Will an Executor with *A.* as in *K.H.6.* In that time was held, nor hath such Coadjutor or Overseer any power to Administer or intermeddle, otherwise than the

then to counsell, perfwade and advife, 21 H.6.6.  
 But I thinke he may, and in consci- 34.Ed.3.  
 ence, should fo doe: And if that will 1. Exec. 121.  
 not prevaile to rectifie negligence, or 29.Ed.3. 39.  
 miscarriings in Executors, he shall  
 well performe the trust reposed in  
 him, if he complaine in the spirituall  
 Court, or Court of Conscience, and  
 it is reason I thinke, that so doing up-  
 on just cause his charges be born  
 out of the Testators estate, or the Exe-  
 cutors purse, who otherwise would  
 not be reformed.

*How an Executor or his Executorship  
 may be limited or qualified in spe-  
 ciall manner different from the  
 generall.*

**N**OW let us see how this making  
 of an Executor may be special-  
 ly qualified; And first, the time may  
 be limited when hee shall first begin  
 to be Executor; and that either cer-  
 tainly, or with some contingency. Se-  
 condly, the creation may be condition-  
 all. Thirdly, it may be partiall or di-  
 videdly, and not intirely.

As to the first, one may appoint

*Vide Gref-  
broke & Fox.  
Plowd.*

*A. and B. made  
Executors, but  
not B. to inter-  
meddle during  
the life of A.  
and good.  
32. H. 8. Bro.  
155.*

*3. H. 6. fol. 6.*

*J. S.* to be his Executor a yeere or more time after his death, this is good. So also if *A.* appoint *B.* his Executor, his sonne, when hee shall come to full age, and in the meantime he dieth intestate. Againe, one may appoint the Executor of *A.* to be his Executor: and then if he die before *A.* he is intestate untill *A.* die: this creation may also be conditional and the condition may either be precedent, or subsequent. In the time of *K. H. 6.* one named *A.* and *B.* his Executors, and if they would not take it upon them, then *C.* and *D.* should be his Executors, and there *A. & B.* refused, and the question was, whether in suite against the debtors of the Testator, *A.* and *B.* should joyn with *C. & D.* as where foure Executors being named, and two refuse and the other two prove the Will, yet all foure must be named in suite against the Testators debtors, as was there admitted, but in the principal cause it was resolved, That the suite should be only in the name of *C.* and *D.* for that the appointment of them Executors if *A.* and *B.* did refuse, did imply

imply that then they onely should be Exec. And here all 4. were never made or intended to be Executors. But *A.* and *B.* upon a condition subsequent, that they should not refuse, and *C.* and *D.* upon a condition precedent, *Viz.* if *A.* and *B.* did refuse. It is usual to make one or more Executors, conditionally that they put in securitie to pay legacies, or in general to performe the Will; nor was it ever doubted, as I thinke, but that this was good: yet I should advise that such condition be plainly thus expressed, *Viz.* either thus, That if *J. S.* do put in security, &c. by such a day, then he shall be Executor, else not; or thus, *Viz.* to make him Executor conditionally, that before he doe administer (Funerall perhaps excepted) he shall put in such security, else perhaps he being Executor till the condition broken, in that meane time may have disposed of all, or most part of the Testators estate. In the late Queens time there was a Case remarkable to this purpose. One willed, that if his wife suffered *J. S.* to enjoy Black-acre (being belike part of her Joyn-

B

ture )

P. 33. *Elizabeth  
Alice Francis  
her case.*



ture ) for 3. yeers, then she should be his Executor, or else *A. B.* should, and the question was in the Common Plees, whether presently before the end of three yeers, shee were Executor, or not till she suffered the land to be enjoyed 3. yeers, and it was held by all the Judges, but the Lord *Anderson*, that she was presently Executor, untill she should disturbe *J. S.* &c. for upon that done, it was agreed that the Executorship would by vertue of the condition be transferred from the wife, to *A. B.* But now during these 3. yeers, might she have disposed of all the goods of her husband, yea within one of these 3. and lesse time, and then have broken the condition, and have left to *A. B.* a dry Executorship. Now to the third point, one may divide his Executors power three wayes. *Viz.* Really, Locally or Temporally; Really thus; he may make *A.* his Executor for his Plate and household-stuffe. *B.* for his sheep and cattell. *C.* for his leases and states by extent. *D.* for his debts due to him; and so divide the power and administration of his Executors, at his pleasure.

19.H.8.3.

19.H.8.Dyer.4.  
Hill.33.Eliz.in  
Com.b.

32.H.8.B70.

115.

sure. He may divide them also for their power locally. *Viz.* *A.* for his goods in Com. Buck. *B.* for those in Com. Oxon. and *C.* for those in Com. Berk. Hee may also divide them in time, *Viz.* his wife, or any other person to be Executor during her life, or during the minoritie of his sonne, or so long as she continues widow, and after his sonne to be Executor. So of like limitation or division, either for time, place, or things wherewith they shall intermeddle. Nay doubtlesse, one may be made Executor for one particular thing only, as touching such a Statute or bond, and no more, and thereof good use may be made, as I think thus. Many have Bonds, Statutes and Recognizances, or warrantie for enjoying of lands, or freeing or saving harmlesse from incumbrances in generall or particular. Now he that hath the selling of land, may by letter of Atturney lawfully assigne them to the partie who buyeth the land, or lease; but this notwithstanding, the interest remaines in him who selleth, and by his Outlawrie they may be

*Que.* If not  
Assets in Law  
when obtain-  
ed.

forfeited, or by him released, any bond to the contrary notwithstanding. And if he die, the interest in law will be in, and goe to his Executors. And in their names only suite or execution may be had and maintained. Now then, if the vendor, besides assignment, make as to this Statute Recognizance or Obligation, only the Vendee Executor. By this the interest, after death of the partie, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used, to sue or take benefit thereof. But *Quest.* if the Vendee his heirs and assignes may be made Executors, so as that securitie shall goe to them one after another, without renewed making Executors. Thus if the party make no other Executor he dieth intestate, as to the rest of his estate, and as to this specialtie only shall have an Executor, and must have a Will proved, and in case he doe make another Will for his estate residue, there must be two Wills proved, but in the other case when by one only Will, one is Executor for

one part of the estate, and another for another, there being but one Will, to be proved, one proving of it sufficeth. And though in premisses of a Will, two be made Executors, joyntly, and equally; yet there may be a *proviso*; that one shall not intermeddle during the others life, so as they shall be Executors successively, and not jointlie, and thus also to other purposes aforelaid, a subsequent clause or *proviso*, may make the partition, and division of authority. But if the *proviso*, or clause subsequent, be meerly contrary to the premises, it will be void, as where two were made Executors, with a *proviso*, or clause, that one of them should not administer his goods: this was held void for repugnancy by *Brudnell* and *Englefield* Justices, but *Fitzherbert* Justice, was of minde that it was not void nor utterly repugnant; for the other might joyn in suits, though not administer. And Justice *Shelley* was of a third opinion different from all the rest, viz. That here was repugnancy; but the last clause should controule the premises, and

32 H. 8. Bro. 1  
Executor 155

19 H. 8. Dy. 3. 4.

*The Office of*  
so this one only should be Executor.

*Who may make an Executor.*

SOME persons may be unable to make Wills, and consequently Executors, for that is all one: whosoever may make a Will, may make an Executor, and he that may make an Executor, may make a Vill. There be xix. severall kinds of persons unable, as the Canonists say, to make VVills, but with many of them we will not intermeddle, because we find no mention of them in our law: the persons principally, and most usefully to be considered of by us are either the defective in understanding, as Infants, Ideots, Lunaticks, and the like, or defective in power and interest, as women covert or married; persons outlawed, attainted, convict or excommunicate; some touch we will give of others as Aliens, Corporations, Villens, Monks & Fryars: As for Infants, and women covert, because much is to be said of each of them, & their administrations, we will forbear to treat of them in this place, but after will doe it of each severally.

To

To begin with an Ideot naturall: he is not able to make a VVill, as was resolved in the spirituall Court, because he wants the use of reason to conceive what is fit for him to will, nor doth the Common law oppose this as I think. A Lunatick having *Lucida intervalla*, that is, some seasons of enjoying his right minde and freedome from his Lunacy, may in those times of his right mind make a will and Executors, else not: for even one by age or sickness, become of *non sana memoria*, is unable to dispose of lands or goods.

One Deafe, or Dumbe borne, may make a grant, saith M. Perkin, if he hath understanding, which is hard as he confesseth; consequently much more a will: but in the time of K. H. 8. it is left a demurre whether a deed by such be good or not. If but mute, he may wage his law, and attorne by signes, and so perhaps by signes declare his will, 44. Aff. p. 36. An Alien may make or be an Executor; so as he be not an Alien enemy, for such cannot sue, as in the late Queens time was held, but there the doubt was whether

*Vide plus la*  
Perk. 5. 6. 33. H.  
8. Dy. 55, 56.  
*Vide* 26. Ed. 3.  
63. l. Intr. 396.

18. Ed. 3. 53.  
26. Ed. 3. 63.  
So in effect.

44. Aff. p. 36. P.  
31, Eli. Pascaria  
de Fontaines  
Case.

Subject of Spaine were at that time to be held an enemy, no war being proclaimed between the Kingdomes, though hostility exercised: As for persons attainted, convicted, or outlawed, it will bee said that these can have no goods of their own; and consequently, they can make no Villenors nor Executors; and it is not to be denied, that we finde it pleaded sometimes by Executors, that their Testators stood outlawed; but first it is cleere, that all and every of these may have goods, as Executors to others, which neither are forfeited by attainder, or outlawry, nor devested by marriage, or villenage, therefore as touching them, they may make Testaments, and that all these sorts of persons may be Executors is evident: So also touching Villenors, Monks and Fryers, who can have no goods to their own uses, and that one attainted of felony, may have an Executor, appears by the case in the late Queens time, wherein it was long debated whether such an Executor might maintain a writ of error or not, to reverse the attainder of the Testator.

33 Eliz. in Bar.  
reg.

As for other Outlawries, the plea  
 thereof by the Executor, that their  
 Testator was, and died outlawed,  
 proves not a nullity of the will, or Ex- 29 Aff. P. 63.  
 ecutorship, for then they might have 49 Ed. 3. 5. 50.  
 pleaded, that they were never Execu- Aff. P. 15.  
 tors. But it tends to this, that no 33 H. 6. 27.  
 goods did or could come to them for 9<sup>th</sup> Eliz. D. 262.  
 satisfaction of the debts, by reason of Contra Co. lib. 4.  
 outlawry, yet it hath been delivered fol. 95.  
 not of old only in many books, but by 19 H. 6. 47.  
 some of late, that debts upon Contract, 30 Ed. 3. 4.  
 where the defendant may wage his 16 Ed. 4. 7.  
 law, are not forfeit by outlawry, nor 5 Ed. 3. 53.  
 uncertaine dammages, for trespassse in 6 H. 7.  
 Battery, or false imprisonment &c.

*Quer.* of breach of Covenants.  
 But goods taken away by a trespassser,  
 may yet be forfeited by the Attainder  
 or outlawry of him from whom they  
 were taken; for that the property in  
 right still appertained to him, and he  
 might have taken them againe, where-  
 soever he found them, therefore the  
 action for this shall not come to his  
 Executor, but for the other, not for-  
 feited it may.

Whether an Excommunicated per- 15 H. 7. fol. 7.  
 son be able to make a Will or not,  
 may



*Summ. Silvest.  
fit. Testum.*

may be some doubt, since *Keble* den  
him abilitie to present to a Church  
and in the very point, anciently the  
pinion of Canonists hath beene neg  
tive, but more lately grew affirmative

*Who may be Executors, more.*

42.E.313.

**A**N Excommunicate person ca  
not sue, that is, proceed in suit  
as Executor, till he be absolved, the  
being danger of Excommunication  
to all that converse with him; but  
this makes not a nullity of his Ex  
ecutorship nor overthrowes the suit  
but staies it only from proceeding, till  
absolution.

21.H.6. 30. A  
Clarke attain  
may be an Ex  
ecutor by Past.  
Just.

*Pascatio de  
Fountaine.* But  
an Alien ene  
may cannot sue  
as Executor. P.

31.E.3. Jac. c. 5

As for persons attainted or outlawed  
we have before spoken affirmatively  
way of prooffe that they make Execu  
tors for continuation of the Execu  
torship. So of aliens, and others before  
Recusants convicted at the time of the  
death of any Testator are disabled to be  
his Executors.

Whether Corporations compound  
or consisting of divers persons may be  
made Executors or not, I doubt, first  
because they cannot be feoffees

ist to others use; secondly, they  
e a body framed for a speciall pur-  
se; thirdly, they cannot come to  
ove a Will, or at least to take an oath  
others doe.

*What a man may give or dispose by his  
Will.*

**H**AVING considered of the makers  
of Executors by Will, and of  
them so made. Let us now consider  
that by this Will, may be disposed, gi-  
ven or bequeathed: And first, He who  
himselfe is an Executor, cannot by his  
Will give, or bequeath to any other  
the goods, chattels, or Credits he hath  
as Executor; the property not being  
vested, for that he hath them, not pro-  
perly as his own, or to his owne use,  
only he may make a Continuation of  
the Executorship, and his Executor  
shall have them as Executor to the  
first Testator, as was resolved by the  
Judges of both Benches in the late  
Queens time: And if he be Admini-  
strator the bequest is also void, nor  
then will they goe to his Executor,  
but to a new Administrator; but on  
his

*Bransby. Vers.  
Grantham.  
Plow. Com. f.  
525.*

*Hill. 20 Eliz.*

At any time in his life he may alter the property.

So 48. E. 3. f. 14. 15.

Where the bequest was to one of the Executors, it was held that the other Executor might release it

If sufficient otherwise to pay all one, as if none.

48 E. 3. p. 14. 15  
11. Ed. 3. Fitz.  
tit. Cond. 9.

his death bed, he may give them word or deed, though not by Will. Next, if a man have debts owing him, as many have much, it is considerable, whether by way of bequest his Will, he can give away any of them to any from his Executor. And doubtlesse he cannot effectually by law, they being not subject to assignment to any except the King: So that he give such a debt to A. and such to B. yet must the suit for them be in the name of the Executor; and so also release, or acquittance for them, and not in their names to whom the bequest is. But when they be received there be no debts to pay, the Executor ought to deliver them to the party whom the bequest is, and thereto may be compelled in Court of Conscience or in the spirituall Court. Therefore the case of bequeathing money payable upon a Mortgage is in the manner to be understood to be good and not otherwise (as I take it) that is jointly estated with any other in lands, or goods, can give no part by his Will; but all will survive, but by Act in his life, he may dispose of them

part, and the Assignee may dispose of  
his moiety by Will, yea, though it be  
himself a Horse, or Oxe, that cannot be  
divided. So if a Lease of Lands or  
Tithes, or Grant of goods to two, *bandum*,  
one moiety to the one, and  
the other moiety to the other, each  
may give his moiety by Will: But if  
he be possessed, or estated, for yeeres,  
by lease, wardship, or extent, &c. in  
the right of his wife, or have the next  
avoidance of a Church in her right;  
he cannot by Will, give, or bequeath  
any of these, but notwithstanding  
they will remaine to his wife, upon  
his death; but yet his gift, or grant  
of them, taking effect in his life time,  
would bind his wife, and carry away  
the interest from her: If one be tenant  
for the lives of one or more; others,  
as oftentimes men take leases for lives, for  
younger persons then themselves, this  
cannot be by Will disposed of, for that  
it is no Chattell, nor is it within the  
Statutes of Wils, for that it is no state  
of Inheritance. Therefore let the par-  
ty looke to convey it in his life time,  
lest it goe to an Occupant, *viz.* him  
who first shall enter, if it be a state of  
Land

Where both  
stated joyntly  
by one Grant.  
Differences be  
tween joyn-ten-  
nants and te-  
nants in com-  
mō, holding by  
severall Grants  
Another kinde  
of Tenants in  
Common.

Land, he must either make Livery, or have a bargain and sale enrolled, or have a covenant to stand seized to the use of his wife, or some of his blood, or make a lease for yeeres determinable upon those lives : Good it be bargain and sale for yeeres, if the thing be in Lease, that so without inrollment, or attornment, the Rent may passe, else a bargain and sale may be made for a moneth, or such like time, and then a release or grant of the reversion instead of Livery and Seisin. But if a man have a lease for never so many yeeres determinable upon lives, or lives, that is to say, if such or such live so long, which unskillfull persons call a lease for lives, this state may as well enough be given and disposed by Will, because it is but a Chattell, if a man be seized in fee, or in taile of land, and having Corne growing upon it, and by his Will doe give the Corn, and dye before severance, this is a good bequest ; because the Corn should have gone to the Executor. So is it also of a person touching his glebe, and a man seized in the right of his wife, or his own right, but for life.

But

but as for trees growing upon the ground, these can no otherwise be given by Will, then as the land it selfe, upon which they grow, may be given: of which matter, as not pertaining to the office of Executors, viz. how and in what manner lands may be given by Will, I intend not to treat in these discourses.

*Stat. Merton. c. vit. dua possint Legare tam de dotibus quam de aliis, &c. Qua.* If the trees may be devised by the Statute of Wils without giving the Land it selfe.

g

*Of the Revocation and Countermand of Wils and new Publication.*

HAVING considered of the making of Wils and Executors. Let us therefore we come to the *Probat*, consider of Revocation, for that may take away the force of a Will mightly made. A Will therefore having two parts, viz. Inception, which is the making, & Consummation which is the death of the Testator, or maker of the Will, there is power in him at any time before death, to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new publications, or re-affirmance of Wils in whole or in part: As therefore a Will may be made

*Omne Testamentum morte consummatur.* See the pleading of it by making a later Will. *lib. intra. fo. 323. b. & 64.*

made by word, so also may a Will made in writing be by word revoked or disannulled; for since every making of a latter Will, is a Countermand, and suppression of the former Will; and since a Will may be made nuncupatively or by Word, & so by making a Verbal Will, one may revoke a written Will; it will thereupon follow that one by word may expresse the alteration of his mind thus far, that the Will by him formerly made shall not stand, but be revoked, and annulled, and the new will stand, and be effectually; so that he after dye without making any new Will, or new publication, or retraction of the former; he dieth in the same state, or without Will. As a Will may be wholly revoked, so it may in part: Hereabout a good resolution was in a *Kentish* Case, where one *Ryete* by his Will in writing did give some Gavel-kinde Land, to one *Harrison*, and five dayes before his death said in the presence of witnesses, that this gift should not stand, and that he would alter it when he came home, desiring them to beare witness of his Revocation. Now before he came home

Whome he was killed by the said *Harrison*, who caused the Will in writing to be proved, and after he was attainted and hanged for the Murther, and his Sonne by the Custome of *Kent*, (*viz.* the Father to the bough, and the Sonne to the plough) entred into the Land, and this manner of Revocation by word onely was held sufficient, although the Will in writing were not cancelled nor defaced. And the like resolution for verball Revocations is implied in the Case of *Forse* and *Hembling*, where it being resolved that a Feme Covert, or married woman, by word Countermanding and revoking her Will formerly made, when she was a sole or unmarried Woman: this was not effectually, nor of force, by reason of her Coverture, taking away the freedome of her Will, hereby it is implied that another who hath freedome of Will may by Word sufficiently revoke a Will in writing; & so was it since also admitted in the Case between Sir *Edward Mountague* and *Jeoffryes*, touching the Will of Sir *Jo. Jeoffryes*, but there a difference was conceived betwixt saying, I will re-

C                      voke

14 Eliz. Dy. 310

M. 28, &amp; 29.

EHz. Co. lib. 4 f.

60.

7 H. 6. f. 13. M.

38, 30. Eliz.



voke my Will, which only expresse  
 a purpose or intent, and therefore  
 was no present Revocation; and say  
 ing I doe revoke it, or it shall no  
 stand, or my heire shall have my  
 Land, which crossed the gift of it by  
 the VVill. And as VVills may be  
 wholly or in part revoked, so may al  
 so the executorship of one or more  
 of the Executors, and yet the VVill  
 may stand in all other parts, so as there  
 be any one Executor or more unre  
 voked: but if all be revoked, then the  
 whole VVill is revoked, because no  
 VVill can stand without Executors  
 and this Revocation may be by word  
 onely, without being expresse  
 the Will or any other writing. But  
 would wish all to expresse such revo  
 cation in the foot of the VVill, or the  
 the names of the Executor or Execu  
 tors so revoked be expunged or blot  
 ted out of the Will, and that this be  
 done in the presence of some witnesses  
 to testifie the act and intent of the Te  
 stator.

Againe, Revocations may be by  
 act in law as well as in fact, or by di  
 rect and expresse termes, as in the  
 Case

Cafe of *Mountague* and *Jeoffries*, where  
 and being devised by Will, and the  
 Devisor after making a feoffment,  
 though there were some defect in the  
 delivery, to make it effectually, or if he  
 made a bargain and sale, that was ne-  
 ver inrolled or granted the reversion,  
 but no attornment had, so as the Land  
 passed not, yet in all these Cases the  
 Will or gift of Land stood revoked:  
 but in Case he had only Covenanted  
 that he would have made such an en-  
 tailed estate, and not done it, this was held  
 to be no Revocation. And so by some,  
 in case he doe but make a Lease, leaving  
 the Fee simple, as it was, but of this  
*Quere*; And if a difference may not  
 be betwixt making a Lease for yeares,  
 and a Lease for life, which altereth  
 the Freehold. If a Lease for twenty  
 yeares be bequeathed to *I. S.* and after  
 the Testator maketh a Lease for fif-  
 teen yeares, reserving a Rent, I take  
 this to be no Revocation of the be-  
 quest; but if the Testator after this  
 Will made, take a new Lease for a  
 longer terme, so as the former Lease  
 is surrendered in fact or in Law, this  
 must needs be a Revocation of the be-

*Vide 6. E. 6. Dy.*  
*74 & 3, & 49:*  
*& Ma. 43<sup>a</sup>.*

quest, or at least an adnullation thereof, and that although the bequest were generally of his Lease, not mentioning the number of yeares; for this which he now hath, is another Lease, and not that which he had at the time of the making of the will. So if one give his black gelding by Will, and after, before his death, he selleth or giveth away that Horse, and buyeth another black one, this new gotten Horse shall not passe by the Will, because it was not the Testators, at the time of making his Will. So also if the Crop in the Barn be bequeathed in *October*, and the party lives till the time twelve month, having sold the Crop and Inned a new, this latter Crop shall not passe by the Will, as the former cannot.

Againe, as revocation may be by alteration of the Devisor, in the Law devised; so may it also be by alteration, in some case of the state or quality of the person of the Devisor. As if a woman sole make a Will, and after take a Husband, this will is void any more, as is resolved in the case of *Forse*, and *Hembling*, doth w

*as I guess. doth  
yea will dispose  
not of the crop  
crop in the barn.*

a Revocation, or adnullation of the Will, for that else it should be irrevocable, since she having lost the freedom of her Will, cannot actually and directly make a Revocation, as we before have shewed. But notwithstanding her Will be revoked, yet in case her Husband before or after marriage, with her were bound or Covenanted, to perform this womans Will, if he so doe not, by payment of the Legacies therein bequeathed, his Bond or Covenant stands good, and be sueable against him, as was adjudged touching the Will of *Elizabeth Smaleman*, married after her Will made to one *Wood*. Who *M, 25, 26, Eliz.* first was bound to performe it: yet another case there is of Alteration in state of the Testators person, which makes no Revocation of his Will. As if he being of sound minde and ability, make a Will, and after become frantick. In this case this is no Revocation. So as his Will stands till his death irrevocable, if he recover not. Now of a VVill Revoked, there may be a reviver by a new Publication, and thereof now.

## Of new Publications.

M, 38, 39, Eliz.  
in ba. reg.

**H**AVING shewed how a VVill may be revoked, and so lose its force, let us now see how without making a new VVill, that so revoked may be revived, and set on foot againe. And that is diverse wayes: as, First, by *Codicell* annexed after thereunto, as was resolved between *Beisford*, and *Barnesot*, in the Kings Bench. Secondly, by adding any thing to the VVill, or making a new Executoe &c. Thirdly, by expresse speech or word, that it should stand or be as a new VVill; as I conceive, to have been the better opinion in the said case of *Mountague* and *Jooffryes*, where yet was much difference of opinion both touching Revocation and new Publication. If a man having made a former VVill, doe make a later which is more than a bare Revocation; yet if afterward lying upon his death-bed, and speechlesse, both the former VVills be delivered into his hand, and he required to deliver to one of his friends about him, that will whosoever

44, Aff p. 36.

he would have to stand, and to keep  
in his hands the other; he thereupon  
delivereth to the Minister or other his  
neighbours, the first made VVill, re-  
mainin in his hands the latter, as was  
done in the time of *Edward* the third.  
Here the former VVill, though made  
void many yeares before, by the latter,  
is revived, and shall stand as the Par-  
ties VVill. But now put the case  
that a Bequest at the first is voyd, yet  
by Publication after, it may be made  
good, as if one give to *Sar.* his wife, a  
peece of Plate or other thing, and  
hath no such wife at the time, but af-  
ter marrieth one of that name, and  
then publisheth his Will againe; now  
this shall be a good Bequest, So if one  
Devise Lands or Goods, which one  
hath not; If he after doe purchase the  
same, and then say that his will be-  
fore made shall stand, or be his will.  
It shall be a good will and bequest,  
for this is in effect a new making. And  
though most of the precedent cases,  
be of Revocation of particular parts  
of the will, and not of the totall: Yet  
first, be it considered that, that part so  
revoked was in effect the substance of

44, Ed. 3. fol. 33.

3, & 4. P. M. Dy.  
143.


the wils: Next, it is easily discerned that if one part be revocable, so is another also; And thus Revocation may spread it self over the whole; nay doubtlesse the whole, *Uno flatu*, may be revoked, as well as by parts, even as a fagot may be put wholly into the fire, as well as stick by stick. And as the *Velleities* or disposing parts of the will, are revocable and revivable by new Publication as aforesaid, so is also the constitution of Executors. As if one of the Executors names be stricken out, and afterwards a *set*. be written over his head by the Testator or by his appointment, now is he a revived Executor. So if the Testator expresse by word, in the presence of witnesses that the party put out shall yet be Executor; but now I mean where the Executors name is not blotted out, but it may be read and discerned; for else the *set* is upon nothing, and if the Verball reaffirmance should renew his Executorship, then must the *will* be partly in writing, and partly *Nuncupative*, his name not being to be found in the written *will*.

## CHAP. II.

Of the state of things instantly upon the Testators death, before any Will proved.

Here we will consider these several things.

1. *What is wrought by a Gift of a thing certaine and knowne, as the White horse, the Red cow, &c.*
2. *What by a bequest to an Executor.*
3. *What wrought by a Release in the Will, to a Debtor.*
4. *What by making a Debtor, or Creditor an Executor.*

 S touching the first, viz. the bequest of a Chattell reall, or personall, which the Testator had in possession, not

withstanding that, if the said Testator had by his Deed or writing, or but by word in his death-bed, or before given these his goods, and dyed before they had been taken, he to whom they so were given, might have



1 & 2. P. & M. have taken them; yet in this case  
 Dy. 110. a. & gift by Will, neither can the Legatee  
 139. b. vide Co. viz. he to whom they are bequeathed  
 8. f. 95, & 96. either take them, or recover them

Of the second.  
 See Co. 10. f. 47.  
 652.

So resolved  
 pas. Trin. 37. E.  
 lix. in b. a. M.  
 only Gaw. con-  
 tr. Portman. pl.  
 & Simes desit.  
 See more of  
 this, Tit. Lega-  
 cy, and of the  
 assent of one  
 Executor  
 one ly

from the Executor, or a stranger  
 taking them, by any suite at the Law  
 for that he hath no property in them  
 yea, if the bequest be to himselfe who  
 is made Executor, be it of Lease, Plate  
 Cattell, &c. They shall not vest nor  
 settle in him as Legatee, but as Exe-  
 cutor, untill expresse or implied  
 election, but made to have and take  
 the same by way of Legacy. And the  
 reason in both cases, is this. viz. that  
 the law preferres debts, and the satis-  
 faction of them, before legacies  
 and ties Executors also to that rule  
 and therefore will transferre nothing  
 from, or out of the Executor, till he  
 having considered of the state of the  
 debts to be paid, and goods out of  
 which the same are to be paid, shall  
 finde that safely this or that legacy  
 may take effect, without making any  
 defect in payment of debts, or draw-  
 ing upon him, and his own goods, any  
 damage or losse, as a VVaster, and  
 thereupon shall assent to such Legacy.

Thun

Thus now is the law taken, but here-  
 fore some opinion hath run other-  
 wise. *viz.* that he to whom any be-  
 quest was made of a thing knowne,  
 and certaine, might take it without  
 any assent of the Executor, and that  
 when to the Executor himself, any  
 goods or chattel, moveable or unmo-  
 veable was bequeathed. In case there  
 were otherwise sufficient goods for  
 satisfaction of debts, the same should  
 instantly, upon the Testators death,  
 without any act or election by the  
 Executor, be transferred into, and  
 unto him, in his owne right, as a Le-  
 gacie, and not remaine in him as Exe-  
 cutor. As for summes of money be-  
 queathed, or so much in Plate, or  
 Rings, it is evident that they must be  
 had by the delivery of the Executor:  
 Yet hath the Legatee such an interest  
 before deliverie, as that dying before  
 payment, it will goe to his Executors.  
 But as I take it, no such to whom any  
 thing certaine is given by Will, can  
 make any gift or grant of it, before  
 the Executor have assented to his ha-  
 ving thereof; Nor perhaps will the  
 Executors assent, after the grant  
 have

27.H.6.8.

Of late perhaps  
 some single or  
 suddaine opini-  
 ons may also  
 have run that  
 way, but in  
*Portmans* case  
 the point was  
 divers times  
 argued, and  
 then adjudged  
 as before.

To be bought.

*Que.* of this  
 see more after  
*Tit.* Legacy,  
 thereabout.

have such relation, as to make good the grant precedent; why so, yet more then an attornment of Lessee, which is alike assent to the grant of another? And *Quere* if by the out-lawry of the Legatee, before the Executors assent, this thing bequeathed be forfeited.

If without just cause an Executor will refuse to assent, he is compellable by Law Spirituall, or Court of Conscience, yet if Spirituall Court presse to doe, where is just cause to stay; a *Prohibit.* lyeth, *ut Credo*, for since Executors stand liable to recovery of debts against them by Common Law. It is reason that Law enable them to keep wherewith to pay. And here yet note some seeming opposition in Law, for where before great difference was shewed between a Devise or Bequest, and a gift or alienation executed in ones life time; Yet the Lord *Deyar* reports it to be resolved, that where a Lease for years was made upon condition, that the Lessee should not Aliene in his life time, that yet a Bequest of this Lease by his VVill, was a breach of the

Condition, as being an alienation in  
his life time.

3. Of a discharge by VVill to a  
debtor, some question may be, whe-  
ther to perfect and make good this, so  
as the debtor may plead it in Barre,  
there be not requisite, as in the for-  
mer, an assent of the Executor. On  
the one side, since this giving is a for-  
giving, for he to whom it is be-  
queathed, cannot otherwise have it,  
then by way of retainer, it may pro-  
bably be said, that here needs no such  
assent of the Executors, as in the case  
where any thing is to be transferred;  
for here is rather an extinguishment,  
and an exoneration then a passage of a  
Chattell by way of *Donation*: On the  
other side, it is probable, that it being  
but a Bequest, and so a Legacie, since  
debts are in Law and Conscience, to  
be satisfied before any Legacies, that  
therefore the Executor having not  
sufficient otherwise to satisfie his Te-  
stators debts, may sue for this debt, &  
refuse to suffer it to passe away as a Le-  
gacie. And to this opinion doe I en-  
cline, as best for Creditors; and satis-  
faction of debts is by Law respected as  
an

Not *de esse*, but  
*de bene esse*.

an act greatly concerning the Testators soule. But some will perhaps make a contrary doubt, that although there be an assent of the Executor to this discharge, yet it will not amount to a legall release, for that debt, at least, if it be by specialty cannot be released but by Deede, and a VVill is no Deede, for a Scale is not necessary thereunto, though it be fit and convenient; whereto I give this answer, that a VVill, though it be not properly and legally a Deede, for it may be good enough without a Scale, which is an essentiall part of a Deede, yet hath it the force and effect of a Deed: for as a Release cannot be made but by Deede, so neither can an Estate or Interest, though but for yeeres in Tithes, Advowsons, Commons, Faires, and like things be granted or assigned otherwise then by Deede: yet it is cleere, that such a state for yeeres in any of these may be given by Will, as well as a Lease of Land, which proves a Will to have the force and effect of a Deede.

*Of making a Debtor or Creditor, Executor, and first of the Debtor made Executor.*

Suppose we then that *A.* and *B.* being made Executors, the Testator was indebted to *A.* twenty pounds, and *B.* was indebted to the Testator twenty pounds, how doe things stand presently upon death. First, it is cleer, that the debt of *B.* to the Testator stands in Law extinct, this making of him Executor, being a release in Law. Therefore let Debtors take heed of making their debtors Executors: And yet doubtlesse me thinkes such a debtor made Executor, should hold himselfe restrained in Conscience, from taking benefit thereof, if (the debt remitted) there shall want to satisfy either debt or Legacie of the Testator: and I doubt whether a Court of Conscience may not justly so order; the Testator, being perhaps ignorant of this point in Law, that this debt should be released by making the debtor Executor. And what is spoken of making the Debtor Execu-

21. H. 7. 31.  
Plow. Com. 185  
cont. Danby &  
Choke 8. E. 4. 3.  
And may be  
granted that  
he should ac-  
count before  
the Ordinary  
for it.

Yea it seemes  
Plowd. 186. a.  
the Law was ta-  
ken to be as su-  
pra. 3. E. 4.

Though he ne-  
ver administer.  
21. E. 4. 3. 81.  
11. H. 6. 38.

2.R.3.20. per  
Starkey & 22.  
per Vavasor.

9 H.5.13. Left a  
demurrer in  
trespasse by all  
against the E-  
xecutor, who  
was trespassor.

3.E.3.23.

6.H.4.3.

8.E.4.3. Choke.

21.H.7.31.

20.E.4.17.

21.E.4.3.61.

Plowd. com. 36

Plow. com. 185.

Executor, generally the same is to be understood of making any one of the Debtors Executor, where there are many joynt debtors: and so also where many Executors be made, and but one of them is debtor to the Testator for they cannot sue without making him who is debtor, also a plaintiff, which he cannot doe against himselfe. The like Law touching Actions of trespassse or account: Yet of old, when one made his Bayley one of his Executors, together with A. and B. who brought an action of Account against the Bayley, in their two names only Justice Herle held the action was brought: This was in the beginning of K. Edward the third his time; but the contrary hath been since resolved some also have held, that though the life of this Executor, who was debtor, he could not be Sued, yet after his death, the surviving Executor might sue his Executor: but that cannot be, as I take it, for that the debt was utterly extinct by the making him Executor, as if the Testator had released it to him; yea, though the Executor dyed before he did ever

minister

minister or prove the Will. And like  
 extinguishment of the debt, if the  
 Creditor marry with one of the Exe-  
 cutors of the debtor: yet was there  
 an action of debt maintained *temp.* 11. H. 4. f. 83.  
84.  
*Edward 3.* by the Husband and Wife  
 against the Husband, and other Exe-  
 cutors upon an obligation by the Te-  
 stator to the Wife, before her marri- 31. E. 3. Fitz.  
Ex. 82.  
 age. But if a debtor take Administra-  
 tion of the goods of his Creditor, this  
 one thinks should not discharge him,  
 but that his debt should stand as assets  
 in his hand because the intestate did  
 not act to free him from the debt.

*The Debtor or Creditor made Executor.*

THIS making of the Debtee Exe-  
 cutor, and so the party who both  
 should pay and be payed, the debt gi- Plow. com. 185.  
 ves him clearly power to pay him- By all the Jud-  
ges but Brooke  
Chiefe Justice.  
Plowd. 185. b.  
 self before any other, if his debt be  
 by Specialty or upon Record. Nay,  
 some have held that so much of the  
 goods of the Testator shall be altered  
 property out of the Executor, as  
 Executor, into him as Creditor, but  
 now that can be, I cannot see: For Where the  
goods be of  
more value,  
which shall  
be so altered.

D                      whether



See *Plow. com.*  
 544. the like of  
 a Legacy of  
 twenty pound  
 given to the E-  
 xecutor.

Or if the goods  
 amount in all  
 to no more  
 then this debt.

See *Plow. com.*  
 185. 13.H.8.  
 15. 11.H.4.83.  
 12.H.4.21.  
 20.E.4.17.  
 21.E.4.3.

whether shall it be satisfied out of the  
 Lease and Chattells reall or personal  
 whether out of the Corne in the  
 Barnes, Cattell in the fields, Plate  
 Householdstuffe, this till some election  
 on made by this Debtee Executor  
 cannot be knowne, nor shall be effected  
 by any operation of Law, preventing  
 the Executors election, in taking  
 his satisfaction, where and how he  
 will. For certainly, as an Executor  
 hath election to pay which Creditor  
 he will first, so hath he election to pay  
 and satisfie himselfe by what part  
 the Testators goods he will: yet per-  
 haps if there be ready money in the  
 Executors hands, there shall be an al-  
 teration of the property of so much  
 thereof as was owing by the Testator  
 to the Executor. And if there come  
 not to the hands of such Executor  
 sufficient to pay himselfe, he may have  
 an Action of debt against the other  
 Executor, or the Heire, as by former  
 hath been conceived: yet let it be well  
 advised of, whether, if he doe admin-  
 ister at all, and specially, if he pay him-  
 selfe any part, he have not thereby  
 barred or disabled his Suit for the re-  
 siduum

fidue. But if he refuse to Administer at all, it were very unreasonable that he should not be able to sue the other Executors, for so a Debtor might by subtilty make his Creditor an Executor with others, and take a course that his goods should come only into the hands of those others, so as the Debtor could not pay himselfe; and consequently, if he could not sue the other Executors, he should thus be stripped of his debt by a sleight. *Quære*, if he may bring the Action in the name of the other Executors, only the Will being proved in his name, as well as in the names of the rest: or whether the Action shall be brought in his name also, and then he be severed at his owne prayer. But against the Heire there is none to joyne with him, and him may he sue, if he havenot Administred as Executor; this admitted, that the Bond extend to the Heire, which without expresse words it doth not, though for the Executor it be otherwise.

*Plowd. 184. b.*  
*et 185. b.* He is barred for he cannot apporation his debt.

*12. H. 4. 21.*

He may sue the Heire, if the Heire be bound, and he have not sufficient goods as Executor.

Thus having considered of the State of things before and without a-

ny Will proved, or other act done by  
Executors: we should now come to  
the point of proof, but two things per-  
tinent to it, are in Order precedent.



### CHAP. III.

1. *What may be done by or to an Ex-  
ecutor before proving of the Will*
2. *Of Refusall, and the things inci-  
dent thereunto.*

*Before probate, what may be done by  
to Executors.*



**A**S to this it is cleare, that  
before proving of a  
Will by the Execu-  
tor, he may seise and  
take into his hand  
any of the goods of  
the Testator, yea enter into the house  
of the Heire, if not locked, so to doe  
and to take the specialities of debts  
and generally he may doe all things  
which to the Office of an Executor

pertaineth ( except only bringing of  
 Actions and prosecution of Suites )  
 He may pay debts, receive debts, make  
 acquittances and Releases of debts  
 due to the Testator, and take Leases  
 or acquittances of debts owing by the  
 Testator: Yea, if before such proving  
 the day incur for payment, upon bond  
 made by or to the Testator, payment  
 must be made to or by this Executor,  
 though no Will be proved upon like  
 payn of forfeiture, as if the Will were  
 proved. Also an Executor may be-  
 fore *Probate*, sell or give away any of  
 the goods or Chattells of the Testa-  
 tor. And whereas the assent of an Ex-  
 ecutor, is necessary to the setting and  
 Execution of a Legacy, as before hath  
 been shewed. So as if one give me  
 his white Horse, or black Cow, by  
 Wil, or any other well known thing,  
 I cannot after his death take it,  
 though I come where it is, but am  
 punishable by action of trespassse, at  
 the Executors suite, if he doe not as-  
 sent; yet an Executor before the Will  
 proved, may give this assent, and it  
 will stand good. Yea, although he  
 die after any of these acts done, the

9.E.4.f.33.47.  
 7.H.4.18.

They cannot  
 sue till they  
 have the Will  
 under the seal  
 of the ordinary

22 & 23. Eliz.  
Dy. 372,

Dy. in Pl. com.  
281. Case of  
Greysbrooke &  
Fox.

Will being never proved by him, yet doe these Acts so done, stand firme and good, as I take it. Yet (as I find) an Executor, making his Will, and dying before he had proved the Will of the Testator; his Executor may not prove both the Wils, and so become Executor to both the Testators. But in case the goods were, after debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testators goods, with the Will annexed, as by Doctor *Drury*, was in the late Queens time declared to be the Law & course of the Court spirituall, to which credit was given by the Judges of our Law, and the Court of *Star-Chamber*: for though the Book doe not mention it to have beene in *Star-Chamber*, it is else where so reported: Yea an Executor, for goods of the Testator taken from him, or a trespassse done upon the Lease Land, or a Distrayning, or Impounding of goods or Cattell, may maintaine before the Will be proved, Actions of trespassse, or *replevin* or *detinue*, for these actions arise upon the Executors

own possession. But before the proving of a Will, an Executor cannot maintaine a suite or action of debt or the like. And the reason is, for that therein he must shew forth the Will proved, under the seal of the Ordinary. And so, as I take it, must it be, if he bring any action for trespassse done, or goods taken in the testators life time, so as the Testator himself was intituled to the action, & it grows not upon the Executors possession. I find that an Executor granting the next avoidance of a Church which to him came from the Testator; the Grantee maintained a *Quare impedit*, without shewing forth the Will: But the Executor himself might so have done, as of his own possession before the Will proved, and so without shewing it under the seale of the Spirituall Court, as well as actions of Trespassse, or *Replevin*, for goods taken after the death of the Testator: yet in the Principall case of *Greysbrooke* and *Foxe*, which was an action of *Detinue* by the Executor, for goods taken or detained after the Testators death, the Plaintiffe did shew forth the Will proved.

34, P. & M. Dy  
135. a.

Dy. in Plow.  
com. 281. a.

Plow. com. 275.  
b.

But that proves not any necessity thereof, or that if the Will had not been proved, it could be no hurt to shew it forth, so upon his own contract for the Testators goods: As if the Executor sell Cattell or other goods of the Testator, before the Will proved, he may for the money payable, maintaine an action of debt, before he have proved any Will: and in this and the action of Trespasse, there is no necessity of naming him Executor. Also on th'other side, an Executor may well enough be sued for debts of the Testator, before the Will be proved; for he may not by his own Act of delaying the *Probate* of the Will keep off Suits, except he will refuse in due manner, that so Administration being granted, there may be some body suable by the Testators Creditors, for debts by him owing. And the usuall plea of the Defendant, to estrange himself from the Testament, is to say that he neither is Executor, nor hath Administred as Executor. So as if he either be Executor *De jure* or *De facto*, by his own act of Administring, it sufficeth.

*Of refusall to prove the Will, and there-  
in of Administration, forecluding  
refusall.*

**N**OW touching this other point,  
fit to be thought of, before we  
meddle with the *Probate*, viz. Refu-  
sall to prove, we will thereabout  
consider these severall parts, viz.  
First how, and in what manner refu-  
sall may, or must be. Secondly, in  
what Cases, or in respect of what acts  
one named Executor hath lost or de-  
termined his election of refusall or  
acceptance. Thirdly, of what effect  
and operation the refusall is, what  
difference, where all the Executors  
refuse, and where but some or one of  
them. Fourthly, what relation it  
hath.

Now touching the first; the Ordi- 3.H.7.14.  
nary, before committing Administra-  
tion, where a Will is made, and Ex- 9.Ed.4.47.  
ecutors named, if he know of it, must 3.He.7.14.  
send out Proces against the Execu-  
tors, to come in and prove it, and if *Plow.com.281.*  
they do not come, they are to be ex-  
communicate; but if they doe come,  
it



9. Ed. 4. 33.

See Plow.

184.4 If  
a Debtee made  
Executor, sue  
the Ordinary  
for the debt;  
this amounts  
to a refusall of  
the Executor-  
ship.

M. 28 & 26. Eli.  
Inter Brookes &  
Cart. in Ba. com.

if they nor any of them will prove,  
reason of such refusall, the Ordinary  
may commit Administration; per-  
haps also they may be appointed Ex-  
ecutors at a time future, and not pre-  
sently. Now refusall cannot be ver-  
bally, or by word, but it must be  
some act entred or recorded in the  
Spiritual Court, and therefore must  
be done before some Judge Spirit-  
ual, and not before Neighbours in the  
Country; for that is not effectual.  
Yet Sir Ralph Rowlet, making to  
Lord Keeper Bacon, Catlin Chief  
Justice, and the Master of the Rolls  
Executors, they wrote a Letter to  
the Ordinary, that they could not at-  
tend the Executorship, and therefore  
wished him to commit Administration,  
who did so; making every of them  
Refusall, and this was held good.  
So as a Lease being by that will be-  
queathed to Catlin, and he after the  
refusall entring and assigning it to  
one, and the Administrator assigning  
it to another, it came in question be-  
tween them whether had best right  
and Judgement was given for the  
signee of the Administrator against  
Catlin.

*Catlin* assignee, whereas, if the refusal had been void, *Catlin* had continued Executor, and so his title had been better. First, in case the Ordinary himself be made Executor, there with the Booke, he may refuse before his Commissary; and so was it there pleaded for the Arch-Bishop of *Canterbury*, who was made Executor to *Sir William Oldballe*.

9.Ed.4.33. The book calls him Cardinall of *Canterbury*.

*What shall be such a meddling or Administring by an Executor, that he cannot refuse after.*

**A**S to the second, where an Executor hath Administred he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election: at least the Ordinary ought not to accept of such refusall, but should commend him to take upon him the Executorship, as the Law was taken both in the time of *Ed. 4.* and of *Queen Elizabeth*: Yet if the Ordinary doe admit one to refuse, notwithstanding that he have Administred; this standeth good, as it seemeth, conceived by

9.Ed.4.47. Selling Land as Executor Admin.

*Dyer* in Case of *Greibrooke & Fox. Plow.com.* 280.b.

*Plow. 7. Eliz.*

26. Hen. 6. f. 78. by the Judges in the time of Hen. for there the Executor commande one to take goods of the Testator of the hands of I. S. who did accordingly; and afterward the Executor refused before the Ordinary, and administration was committed to the said I. S. who brought an action of trespassse against the party so taking the goods from him; and there the refusall and committing administration were admitted to be good: perhaps *Factum Valet quod fieri debuit*. And it well may be that the Ordinary did not know of the Executors such intermedling, at the time when he did admit of his refusall. After Refusall, and Administration committed, the Executor cannot go backe to prove the Will, and assume the Executorship: but if only upon the Executors making default to come in upon Proces, to prove the Will, the Administration be committed, here the Executor may yet at any time after come and prove the Will, and so undoe the Administration: as was in the late Queenes time resolved, between *Bale* and *Baxter*.

Mich. 27. 28.  
Elix.

But what if after refusall it shal appear to the Ordinary, that the Executor had administred before his refusal, so as had it been then knowne, the Ordinary should not have admitted him to refuse. Whether now may he revoke his administration (for it is revokeable) and inforce the Executor to proceed to proving of the Will. And surely me thinks he may, for that the Executor by Administring had determined his election and accepted the office of Executorship; now he cannot both accept and refuse: Besides, we know that Creditors may maintaine their Suites against him, having once Administred: the Common Plea to free himselfe, and shew that he is not the party suitable for the Testators debt, being that he neither is Executor, nor ever did Administer as Executor, wherefore he having administred, it will be bound against him. Now it is not congruous, that in the Spirituall Court there should be no Executor, and yet in the Courts of Westminster there should be an Executor. But since this Point of Administring is so mate-

*Boxes Case, in eom. ba. A. being Executor did administer and yet would not prove the Will. B. tooke Administration, and being sued for debt, did plead the matter supra, and held a good plea, and was found for him before Just. Dothoridge ad Oxon. in a stat. 2. Carol. reg.*

## The Office of

36. Hen. 6. 7.

materiall to the Point of being admitted, or not admitted to refuse; we here consider in this place, briefely what shall be said to be an Administration by an Executor, determining his election, and disabling his refusal and what not. 1. Some will perhaps conceive, that the act of the Executor in the fore-mentioned Case where he only commanded I. S. to take goods of the Testators out of strangers hands, was no Administration; and it is true, that in that Book it is passed in silence, and not expressed to be an Administration.

But the Lord Dyer in the Case *Greisbrooke and Foxe*, speaking of the Case, saith expressly, that the Ordinary might there have rejected the Executors refusal; for saith he, when the Executor had once intermeddled he should not have been suffered to refuse; so as he doth clearly admit that to have been an Administration. And else-where it is held, that if an Executor take goods of the Testator and convert them to his own use; this is an Administration; yea, if he do but take them into his hands, for

21. Ed. 4. 5.

21. H. 8. 19. 20.

33. H. 6. 31. 8.

Y 9. 62. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

what is the meaning of an Executor?

and what is the meaning of an Executor?

and what is the meaning of an Executor?

and what is the meaning of an Executor?

and what is the meaning of an Executor?

and what is the meaning of an Executor?

ne, without converting of them:  
 the Wife take more apparell of her  
 one than is necessary, this is an Ad-  
 ministration, as the Booke admits; but  
 by the assent or delivery of the Exe-  
 cutor, it is not. More clearly, If one  
 either pay debts of the Testator,  
 receive debts, or make acquittan-  
 ces for them, or demand the Testators  
 debts as Executor; or give away  
 goods which were the Testators, or  
 deliver money of the Testators for  
 debts about proving the Will; all  
 these are full and cleare administration  
 as Executor. But saith Fitzherb.  
 he only lay out his owne money for  
 debts, this is no Administration; so saith  
 Cowick, if he pay debts with his own  
 money, and if he doe it about the Fu-  
 nerals. But some difference may be  
 betweene Acts done by one, named  
 Executor, and by a stranger, viz. to  
 make him an Executor of his owne  
 wrong, whereof we shall speak after,  
 but in this place. If one being sued  
 as Executor, take it upon him, and  
 plead in Barre as an Executor, this is  
 Administration.

*nota*

1. Eliz. Dy. 166.

13. Ed. 3. Exec.

91.

3. 4. Ma. Dy.

135.

26. H. 8. 7. 8

20. H. 7. Kew.

63.

21. Ed. 4. 5.

20. H. 7. f. 5. a.

9. Ed. 4. 12. 13.

33. H. 6. 31. a

Of

## Of the force and effect of refusall.

**A** Sto the third Point, viz. the force or effect of refusall. First it is cleere, that if there be but one Executor, and he doe refuse, or being many, if they doe all refuse, then is the party dead Intestate, and Administration is to be committed with the Will annexed, as is before said; nor can any after meddle as Executors. But in case there be divers Executors, viz. **B. and C. and A.** only refuseth, and the Will is proved by the others, then **A.** continueth an Executor; notwithstanding his refusall, so as he still may release debts of the Testator; and debts owing by the Testator may be released to him; yea if Suite be brought, had, by, or against the Executors, shall not be in the name of **B. and C.** only; but **A.** also must be named as Plaintiffe, or Defendant, else the Action may be overthrowne. For the Will being proved, all the Executors therein named stand and continue Executors; notwithstanding any of their refusall, as it was resolved in the

*Cooke, lib. 5. f. 18*  
*Cent. 18. E. 2.*  
*Bre. 837.*

*22. Ed. 3. 19.*  
*15. Ed. 3. Exe. 8*

*41. Ed. 3. fol. 22.*  
*21. Ed. 4. fol. 24.*

after end of the late Queens time, according to divers former resolutions, and therefore this Executor which hath refused, may afterwards Administer at his pleasure, and intermeddle with the goods, as well as the others: yet saith Brooke Chiefe Justice, after 42. Eliz. Co. 9. f. 36. 37. the death of his Companion, he cannot so doe, but then the Executor of him who proved, is onely to Administer, *Quod non ex Lex.* There may be some difference betweene Sutes by Executors, and Sutes against Executors; for when themselves sue, they being privie to the Will, and having the Custody of it, must bring their Action in the name of all the Executors, according to the Will; but hee that is to bring an Action against them, need not perhaps take notice of more Executors, than those that have proved the Will, or otherwise doe Administer: for it is no good plea for themselves in an Action against them, to say there is another Executor, without saying also that he hath Administered, as it seemeth by divers Bookes. Nay one Booke in the time of Henry 8. goeth further, viz. that if

4 & 5. Ph. &  
 Ma. Dy. 169.  
 E. 6. contra.  
 21. Ed. 4 23. 24.

**B**

E

Sute



33. H. 6. 38. a.

Co. 9. 37. 6.

32. H. 6. 25.

27. H. 8. 11. p.

totam curiam.

9. E. 4. 33.

Co. 9. fol. 36.

Sute be brought against all, yet one  
 them not intermeddling with the pro  
 ving of the Will, may plead that  
 was never Executor, nor Administ  
 as Executor. By this it should seem  
 that Executors refusing (I meane  
 of them, so as no Will is proved) the  
 in an Action against them, may  
 that they were never Executors; b  
 me thinkes they should not so plea  
 but shew the speciall matter, as w  
 done in the time of *Edward*  
 Fourth.

As for Relation, I will forbear  
 speake, till I come to proving, for  
 Probate and Refusall stand in  
 same state, as touching Relation.

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CHAP. IIII.

*Of proving of Wills.*

**N**OW let us see touching the Probate of Wills, what is considerable; and therein of these three or foure parts;

1. *Where, and before whom, and how the prooffe must be.*
2. *What shall be Bona notabilia, to intitle to Probate.*
3. *What force or validity, either a right, or erroneous Probate hath.*
4. *What relation either Probate or Refusall hath.*

**A**S touching the first point, viz. How, and where, and before whom Wills are to be proved, briefly thus;

The proving is in the Spirituall Court: yet in some Manors by Pre-

E scrip-

2.R.3.Fitzh.4  
Co.lib.9.fol.43.

11.H.7.12.

Plow.Com.279.

scription, Wills are to be proved before the Steward, though no Land thereby passe, as appears by diverse Bookes : and in the Manor of *Maunsfield* is this Prescription; and in others, whereof *Tremaile* was Steward in King *Richard* the Third his time, as he declared. And the like may tell of my owne knowledge touching the Manors of *Cowley* and *Caversham* in the County of *Oxford* where I have kept the Courts for the Lord *Vicount Wallingford*, and found it in present and frequent use. And it is said by the Judges, in the time of King *Henry* 7. that this proving Wills in the Court Spirituall, is an ancient but of latter time. Yea it is acknowledged by *Linwood* the Dean of the Arches, that it pertaines not to the Spirituall Court of Common right; nor is so in use in other Kingdomes. The reason why the Law of *England* hath herein given way to the Ordinary, and Court Spirituall, is said by *Walsh* in *Greisbrooke* and *Faulkner* Case, to be the pietie and integrity which is presumed to be in those that Function, having charge of souls.

Indeed they are, as it seems to me, Executors of the New Testament; or last Will and Testament of *Jesus Christ*; whereby great Legacies and Gifts are given to men, and by Pastors to be dispensed and distributed : of which distributers, it is required, as Saint Paul saith, *That they be found* 1 Cor. 4. 2. *faithfull*. And happy are they who with him can pleade, *Plenè Admini-* Acts 20. 27. *stravit, viz.* that they have fully Administred, as he did; much depending hereupon, *viz.* Gods honour, the blessing, prosperitie, and safety of the Country; the Pietie, Justice, Conscience, Contentation and Salvation of men. As for Wills proved in *London*, and *Oxford*, before the Major, that is only in respect of the Burgages within those places devisable, but they were to be proved also before the Ordinaries, in respect of the goods, and there onely where no lands bequeathed.

The proving then is to be before the Generall, Particular, or Speciall. By Generall, I meane the *Metropolitane* or *Arch-bishop*, before whom it is to bee proved; in case

*Vide fol. prox.*  
If Bona Notab.  
both in Canter.  
and Yorke.

the Testator have goods valuable called *Bona Notabilia* in divers Diocesses, whereof he is Superior.

*Of Bona Notabilia.*

**W**Hat shall be said to be *Bona Notabilia*, is considerable, for thereabout hath been much diversity of opinion: Some holding, that they must be of forty shillings value; some five pound, some tennē pound; yet some, that the value of a penny sufficeth to draw it to the Archbishop from the particular Bishop. But that difference of opinion I conceive to be now cleared, by a Canon made in the first yeare of his Majesty's Reigne, at a Convocation held, where by it is established, that five pound shall be the summe, or value of *Bona Notabilia*; yet therein is this Provision, that where by Composition or Compromise in any Diocesses *Bona Notabilia* are rated at any greater summe; the same shall continue not altered. It is likewise thereby provided, that if any man dye in *Itinere*, viz. in his journey or travell, the goods which he then hath about him, shall not cause

Canon 92, 93.

that Administration shall be committed, or the Will proved before the *Metropolitane*.

Having considered of the value: now another Point observable, is, what things shall be said to be *Bona Notabilia*. And as to that, debts owing to the Testator are *Bona Notabilia*, as well as goods in possession; their value being answerable; yet I think, if the *Penall* summe of the Bond be but five pound for payment of a lesse sum, although the Bond be forfeited; yet in the Spirituall Court, where respect to Conscience suppresseth the favoring of Executors; this will not be taken to be *Bona Notabilia*, viz. of five pound value, although in Law the whol *penall* summe be a duty. But if the debt be five pound or more, although it be desperate or due from the King, against whom no Suite can be brought, but only by petition; yet will this stand for, and as *Bona Notabilia*, as I take it in the Court Spirituall: whereabout I can but conjecture since the Rules of our Law determine it not. And this point touching the Kings being debtor, I find debated in

21 Eliz.

Goods consi-  
derable or con-  
spicuous.

the late Queenes time, but not resolved, so farre as I finde : but there *Phan* at the barre urged, that no debt should be *Bona Notabilia*; and if it should, yet not such, for which no remedy by Sute, as in that Case, the Queen being debtor. Yet a further Question Locall, is touching these debts, or things in action, in places Diocesse, they shall be said to be *Bona Notabilia*, viz. whether in that place where the debtors be, or where the Obligation, or other Specialties be. And as to this, the Law hath been taken, that because the persons of the debtors be moveable, passant, and transitory; therefore these debts shall be said to be, and to make *Bona Notabilia*; where the Bonds, or other Specialties be, and not where the debtors inhabit and dwell: and so was it not long since conceived by Justice *Walshy*, and Justice *Beaumont* in one *Primmers* Case, no other contradicting herein therefore many are mistaken who only in respect that the persons of the debtors doe dwell in forraine Diocesses, other then the places of the death of the Testator, or where

Hil 37. Eliz. M.  
Comu. Da. Vide  
13. & 14. Eliz.  
Dy. 305.

is other goods were, doe take Administration in the prerogative Court, though the Specialties remained where the party dyed, or his goods residue were. But in case the debts be only by Contract without Specialty, then indeed they are to be esteemed *Bona Notabilia*, there, and in that place, where the debtor is; as the said Judges well conceived the difference. But in case Land be given to Executors, for payment of Debts or Legacies, this shall not be *Bona Notabilia*, I take it, though it be Assets.

*Of the validity, and invalidity of Probates.*

AS to the third point, we will first see of what validity and erroneous prooffe is, and thereabout we shall find this difference: admitting that there hath not *Bona Notabilia* in divers Diocesses, so as of right, the proving of the Will appertaineth not to the *Metropolitane*, and yet the Will is proved before him; this is not meerly void, but stands in force, till it be reversed by some sentence upon appeal



22 Eliz.

peale, as was resolved between *Venerable* and *Jeoffryes*, in the late Queens time. But on the other side, in Case one have *Bona Notabilia* in divers Diocesses, or a Peculiar Diocesse, & yet the Will proved before the Particular Bishop within whose Diocesse part of the goods are; this is meerly and utterly voyd, without any reversal. So also of proving in some Peculiar. And in Case one have *Bona Notabilia*, both in the Diocesse of *Canterbury*, and in the Diocesse of *Torke*; the Will must be proved, either before both *Metropolitans*, if within each of their jurisdictions there be *Bona Notabilia* in divers Diocesses; or else, as I take it, if there be not in any of the places, then before the particular Bishops in those severall Diocesses where the goods are. Or if within the jurisdiction *Metropolitane*, the Testator had goods in divers Diocesses; as in th'other, but in one Diocesse; then in the one place is the Will to be proved before the *Archbishop*, and in the other place before the Particular Bishop, as I conceive. And so also of peculiar jurisdictions. And in some place

Places Archdeacons have peculiar, or jurisdiction ordinary, and power to make *Probates* of Wills, and Grant Administrations. But where any like error or misproving is in these respects, it is cause of reversall or of nullity, according to the former difference; so also, if there be falshood in the proove, were it *Communi forma*, that is, without witnesses, yet may it in the Spirituall Court be undone; if either disproofe can be made, or proofe of revocation of that Will be made, or of the making of the latter.

Now, yet admitting the Will true and right, and also rightly proved; let us yet see the force and strength of the Proofe, or Will so proved. It being under the Seale of the Ordinary, cannot be denied, sayth one book, to wit, whether this shewed forth, be 9 Ed. 4. 47.  
 Will proved or not, no, though the 22 Ed. 4. 50.  
 proofe be but indorsed on the back, 22 H. 6. 52.  
 viz. that it is so proved, saith the book,  
 but notwithstanding the Defendant  
 so sued, may deny that the Plantiffe is  
 Executor, as not being concluded  
 nor estopped by the *Probate*, so to say.

And

*Plow. Com.* 282.

44 *Ed.* 3. 32.

19. *Aff.* p. 2.

And the reason is, because the Se  
of the Ordinary is but matter in Fe  
and not matter of Record; nor  
the sentences of divorce, and the li  
in the Spirituall Court, Judgement  
or matters of Record, as hath be  
often held.

*Of the Relation of Probate  
and a Refusall.*

*Plow. Com.* 281.  
a 283.

**A**S for this last Point, both  
Proving, and the Refusall sh  
have their Relation to the death  
the Testator, as I take it to divers po  
poses. So as the Proving, saith  
Lord Dyer expressly, and confidently  
in *Greysbrooke*, and *Foxes Case*, and the  
resolution also of the Case proves  
For there Administration being com  
mitted before any Will proved or re  
tified to the Ordinary, as it shoul  
seem, the Administrator sold some  
the goods to *I. S.* and after the Ex  
ecutors proving the Will, brought  
Action of *Detinue*, for those goods  
gainst *I. S.* who pleaded this Admini  
stration and sale, and thereupon the  
Executor demurred, and Judgement

was given for him, as having by the proving of the Will, disproved the administration *ab initio*, but it is true that judgement was given onely by two Judges; one being absent; and another dissenting in opinion; yet I think it was right, and according to law; and the Refusall shall have the like relation; else could not the Administration relate to the death of the testate, as it doth to some purposes, expressed in divers bookes, *viz.* to have an Action of Trespasse for goods taken before Administration committed and to have a rent growing payable in that meane time, &c.

18 H. 622. 5.

4 E. 4. 33. 47.

Not to make  
good a Release  
made before

Co. lib. 5. 28.

36 H. 6. 8.

2 Ma. Dy. 110.

### What Fees to be paid upon Probate or for Copies of Wils, or Inven- tories.

Per. Stat. 21. Hen. 8. Cap. 5.

Where the goods } onely six pence to  
amount not above } the Scribe.  
five pound. }

2. Where

2. Where they be above { two <sup>s</sup>. six <sup>d</sup>.  
 five pound but under { the B.B. two  
 forty pound. { d. to the Scribe

two <sup>s</sup>. six <sup>d</sup>. to the B.  
 3. Where above { two <sup>s</sup>. six <sup>d</sup>. to the Scribe  
 forty pound, to { or, 1. <sup>d</sup>. for each ten li  
 be taken but- { of ten inches long at  
 Scribes choyce.

**T**Hese Summs are to satisfie, be  
 for Proving, Registring, Sealing  
 Writing, Praising, making of Inven-  
 tories, giving Acquittances, Fines  
 and all other things concerning  
 same.

Where Lands is given to bee sold  
 neither the mony raised, nor the pro-  
 fits thereof shall be accounted as a part  
 of the Testators goods, or charged  
 faith the Statute.

Note, that the Will is to be brought  
 with wax thereunto, ready to be sealed  
 led, and proove to be made of the  
 Will, according to common Couse  
 stome.

For making the Inventory, the Ex-  
 ecutor

Executor is to take, or call to him two Creditors or Legatees of the Testator, and doe it in their presence; or in their absence or refusall, two honest persons being the next of his kin, or in their default, two other honest persons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make oath for the truth of it.

For a Copy desired by any either of a Will or Inventory, no more is to be payed than before is allowed for the Registring, with the like charge to the Scribe, or Register, as above said.

Master *Swinborne*, saith that an Executor is to sweare, and if it should be thought fit, to be bound to make a true account when he shall bee thereunto lawfully called by the Ordinary: Of this account, see him, pag. 74. and of accounting some books of the Common Law make mention, as 3. of *Edward the Third*, *Fitzh. Exec.*

Where *Trew* saith, that of a thing in

See also 31. E.

3. cap. 11.

An Administ.

shall account as

an Executor,

*Fitzh. exec. 21.*

and 837. viz.

18. E. 2. tit.

Briefe.

48. E. 3. 14. 15.

Of a duty resting in account, it is said, the Legatee shall have remedy by account, in the Spirituall Court.

81 E. 4. f. 3.

*Moyle.*4 H. 7. 15. per *Wood.*

9 E. 4. 47. Doct.

& *Stu.* 78 b.

21. Ed. 22.

*Plow. Com.* 544.

4 H. 7. 15.

*Keln. rep.* 64. a.

in action, no account shall be before the Ordinary; but *Parn.* seems of contrary opinion. And else-where it is said, that where a debtor is made Executor to the Debtee, he shall give account before the Ordinary, for the debt: yea, as of money in possession, saith one, which others denied.

An Executor by wrong, shall be drawn to an account before the Ordinary, saith *Moyle* Justice. But *S. German*, he may not force any account against the Order of the common Law; not shewing what that is. And *temp. Edw.* the 4 it is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to doe, *quod non credo.*

Also of the oath of an Executor Books tell, but not to such purpose as *Swinb.* but truly to performe the Will.

## CHAP. V.

*What things shall come unto Executors, and be Assets in their hands, and what not.*

**T**He things which shall come to Executors, are of great multiplicity, and would make a large and confused heap, if tied together in one bundle or lump. I will therefore divide and sort them out in parts, after the best manner I can. First, we will divide them into things possessary, or actually in the Testator, and things in action, or not actually in the Testator. Secondly, the possessary into chattels, real and personall, or (as some lesse properly expresse it) moveable, and immoveable.



## Of Chattels reall possessary.

**T**Hese may be divided into two kinds, viz. living, and not living the living are not many and various

**F**irst, The wardship of the body of another, be it by reason of a tenure of the present owner, or by assignment from the King, or other Lord to whom the tenure was is a Chattell reall, not personall, though it be an interest in the person of another, but is in respect of a tenure of Land, or other hereditaments, and is for years viz. during the minority, or till marriage had, and so is reall. Next Villen for years, as by grant for a term from him that had the Inheritance is a Chattell reall. As for an Apprenticeship for yeares, it is by Custome, as I take it, that he goeth, or is derived to Executors: but for reason after shewed I think this Interest be not in the reallty, but in the personalty rather. As of a debtor in Execution for debt, the Interest in him or perhaps more properly in his liberty is not as I conceive (for reasons which after I shall

preſſe) a reall, but a perſonall Chattell. The like Law of a Priſoner taken in the Wars. As for Fiſhes in a Pond, Conies in a Warren, Deere in a Parke, Pigeons in a Dove-houſe, where the Teſtator had the Inheritance, or but for life, in the Pond, Warren, Park, and Dove-houſe, they are not Chattels at all, nor to goe to the Executors, but to the Heire with the Inheritance. If the Teſtator were but a Termer, they are to goe to the Executor, but as acceſſary chattels, following the ſtate of their principall, viz. The Warren, Park, Dovehouſe, Pond, &c.

The reall Chattels, not living, are either in Houſes or Lands moſt uſually, and that three waies. Firſt, by Leaſe for years. Secondly, by Wardſhip of Lands held by Knights ſervice. Thirdly, by extent upon Judgements, Statutes, or Recognizances; Or in things iſſuing out of Houſes or Lands, as Rents, Commons, Eſtovers, or ſuch like. But where an Inheritor reſerves a Rent upon a Leaſe for yeares, this ſhall not goe to the Executor, but to the Heire, with the Reverſion, other

than Arretages behind, at the death of the Testator. Also Common Corodies for yeares, Advowsons, Tithes, Faires, Markets, Profits of Leetes, and such like, which the Testator had for years, all which may accrue any of these wayes, as the first are Chattell & Reall. Yea, one simple presentation to a Church, upon the next avoydance, is a Reall and not Perpetuall Chattell, before it come to be void, and what then it is, we shall after shew. And the title accrued to the Crown, upon attainder of felony where the party held not of the King viz. The *Annum diem & Vastum* that is, power not onely to take the profits for yeare, but to waste and demolish Houses, and to extirpate and eradicate Trees and Woods, is but Chattell, and therefore though granted to one and his Heires, by the King yet shall goe to the Executor, and not to the Heire.

Temp. E. I. Aff-  
fise 124. Fitzh.

*Some doubtfull, or lesse cleere Cases,  
touching Chattels Reall.*

**F**irst where we spake of Wardship, it is not to be understood of Wardship, by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian, who now after the death of the first Guardian, shall be next of Kin, if the Ward continue under fourteen years old, else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattell, nor shall goe to the Executor, nor to the Heire, but to him who first enters and claimes it as an Occupant, if no assignment be in the life of the Lessee made: Contrarily, of a Lease for many yeares, if three, or more, or lesse, so long live; this is a Chattell, and shall goe to the Execu- 37. Aff. p. 11.  
tor. So an extent upon a Statute, yet it is delivered to the party as a Freehold, viz. *Ut liberum tenementum*, but that only makes it to be *quasi liberum tenementi* as to the maintaining of an Assise, if wrongfully put out. Where

4. E. 3. Aff. 166.  
ro. Chat. 15.

*A*

one is seised in the right of his Wife, of Land, or other Hereditament, and is attainted of treason or felony, the profit thereof accrued unto the Crown, is but a Chattell, and though the King grant it to one and his Heires, yet it shall goe to his Executors. And if one, having a Lease for many years, viz. a 100. 500. or more or lesse, and doe devise and bequeath the same to *A.* and the Heires males of his body, and for want of such issue to *B.* and the Heires males of his body, and dyeth, having issue a Sonne, the terme shall not goe to his Sonne, but to his Executor or Administrator, for it cannot be made a matter of Inheritance; so if *A.* had dyed without issue male, the terme should not have gone or remained to *B.* but to the Executor or Administrator of *A.* as was lately adjudged in the Exchequer, between Sir Robert Lewknor, and Mistris Hamond. So of an advowson, or any other hereditament, granted or devised to one and his Heires for a 100. yeares; or if such a termier grant a Rent out of the Land to *A.* and his Heires, or the Heires, or Heires males

29. E. 3 37.

So *Manwood*, if granted for life it is but a chattell, *Plow. com.* 524.

of his body, yet shall the same goe to the Executor, and not to any Heire; for it being derived out of a Chattell cannot be any freehold or Inheritance, but it self, a meere Chattell.  
*Mortuus sequitur ventrem.*

*Of Chattells Personall.*

Personall Chattells, or Goods moveable, are also in like manner to be divided into quick, or dead. The quick are Cattell of all Kindes, as sheepe, Horses, Kine, Bullocks, swine, Goates, Geese, Ducks, Poultry, &c. There may be also in living Creatures reasonable, an Interest, as in a Chattell personall, as in the person of a man taken in execution for debt. And this I hold to be in nature, not a Reall, but a Personall Chattell (as before was touched) for that debt is the root of it, and the body is but a pledge or gage, dischargeable instantly upon payment, release, or other discharge of the debt. Like Law of a Prisoner taken in the Warres, for hereof and therein, as in a Chattell, hath the party a legall Interest, as appears by a Writ of Trespasse in the

*No. na. br. 88.*

*Reg. orig. f. 102.*

There is mentioned that the prisoner was to have a 190. l. for his ransom.

Register, for taking away a Prisoner  
*viz. Quare quendam Scotum prisonari-  
um suum cepit, &c.* And note lately  
*viz.* In the time of King Henry the  
the King himselfe, upon the winning  
of *Bullen* bought divers Prisoners of  
his Subjects. And by a Statute in the  
beginning of Henry the 6. his time  
this Interest in a Prisoner is mention-  
ed as valuable, and coming from  
one King unto another; therefore  
doubtlesse shall goe from Testator  
Executor by death, and not be infran-  
chised or freed thereby. The inter-  
est which one hath in an Apprentice  
I take to be rather Personall than Re-  
all, though for yeeres, because not  
springing out of any Reall roote, as  
Wardship, and Villenage doe; but  
out of a meere contract. As for a  
Servant whose master is dead, doubt-  
lesse he is legally discharged, and is  
not servant either to Heire or Exe-  
cutor; but meere and honest it is, that  
one of them continue him in service  
till a fit time of providing him a new  
Master, and fit for him, not to depart  
suddenly. Now for things personall  
without life; These are evident, *viz.*

Bro. no. ca. 295.  
& tit. Property  
38.

1. H. 6. cap. 5.

all Householdstufte, Implements, and  
 Utensills, Money, Plate, Jewells,  
 Horne, Pulse, Hay, Wood felled, and  
 covered from the ground, Wares,  
 Marchandise, Carts, Plows, Coaches,  
 Saddles, & such like moveable things.

*More doubtfull cases touching things  
 personall.*

First touching things living: If the  
 Testator had any tame Pigeons,  
 Deere, or Conies, or Fesants, or  
 Partridges, these all as well as Chick-  
 ens shall goe to the Executors; so  
 though not tame, if they be taken and  
 kept alive in any Roome, Cage, or  
 like Receptacle, as Fesants and Par-  
 tridges often be, so fish in a Trunke,  
 also young Pigeons, though not  
 tame, being in the Dove-house, not a-  
 ble to flie out; yet their Dams the old  
 ones shall go to the Heir with the dove-  
 house. And if the Testator had any re-  
 claimed Hawks, they also as Chattells  
 personall shall go to the Executor be-  
 cause they are things commonly ven-  
 dible. And whereas Hounds, Grey-  
 hounds, and Spannells, be not so  
 commonly bought and sold, nor so  
 anci-

10.E.4.14,15.  
 Come of wilde  
 ones. 22.H.7.  
 Kelm. rep f.88.  
 118. Co lib. 11.  
 f.50.18.H.8.2.

10.E.4.14.15.  
 & 18.E.4.8.  
 So of young  
 Hawkes in the  
 nest. It is felo-  
 ny to steale  
 these, Ergo.  
 they be  
 goods.



So an Hunters  
horne, a Falko-  
ners lower.

Hares, Deere,  
Fesants, Par-  
tridges, wilde  
Ducks, &c are  
good meate.

anciently have been, yet are they now  
growne to be a Merchandize, and  
why not? for although they be for the  
most part but things of pleasure, they  
hindereth not but they may be valu-  
able, as well as Instruments of Mus-  
icke, both tending to delight and ex-  
hilarate the spirits. A cry of Hounds  
hath to my sense more spirit & vivaci-  
ty than any other musick. Add hereunto  
that there may be some profit, and ad-  
vantage gotten by them, both *quod*  
*adeptionem boni, & ademptionem mali*  
the getting of some good food, & the  
preserving of others, as Lambes, Cal-  
ves, Pies, Fish, Poultry, by killing Foxes  
wilde Cats, and others, which destroy  
them. And we know that money is  
recoverable in damages for taking  
away such, or a Mastiffe, serving to  
keepe an house. So of Ferrits to catch  
Conies, &c. Therefore they are valu-  
able. But it may perhaps be objected  
that none of these above are Chattell,  
and therefore not replevisable, con-  
sequently no property in them, for  
when more then one living Chattell is  
distrained, the replevin is not to be  
by the name of *Averia*, signifying  
Chattell

Cattell. For answere, not to insist  
 that one may have property in divers  
 things, whereof no *Replevin* lyeth, as  
 orne or Hay, nor in Sackes nor  
 wares, money not shut in bagge, nor  
 &c. I further say that even the  
 word *Averia* may be applyed to these,  
 so I finde it to Hens and Capons in  
 the Booke of Entries, viz. in the writ Fo. 142.  
*Curia Claudenda*, where the Plain-  
 tiff complaines of the Defendants  
 making his *Mounds*, *per quod ave-*  
*ripsum. A. viz. Capones, galline & a-*  
*Averia ipsius. A.* that is, whereby  
 Cattell viz. Capons and Hennes  
 and other his Cattells came into the  
 Plaintiffs house and Garden to his  
 damage, &c. And both *Newport*, and Hen. 8. fol. 3.  
*Widgate* hold that a writ of *replevin*  
 lyeth of such things, though *Brudenell*  
 were of contrary opinion, yet he also  
 would an action of Trespasse maintain-  
 able for taking of them, and therefore  
 committed a valuable property in  
 them. Now come we to things with-  
 out life, and first to those abroad in the  
 fields. Put the case that a man dies in  
 fee (before Harvest I meane) seised  
 in fee, or in Fee, or Taile, in his  
 owne

owne right or his wives, or estated  
 yeers, of Land, in the right of  
 Wife, being sowne with corne, or  
 manner of Graine, the common say-  
 is, *Quicquid plantatur solo, solo*  
 yet this shall goe to the Executor  
 the Husband, And not to the W-  
 or Heire, who shall have the Land  
 but Hay growing, viz. Grasse re-  
 to be cut, Apples, Peares, and o-  
 fruite upon the trees shall goe to  
 Wife, as also if they had been upon  
 mans owne Land of Inheritance, it  
 should goe to the Heire, though  
 Corne should goe to the Executor  
 The reason of difference is, because  
 this latter comes not meere-ly from  
 the soile, without the industry and  
 manurance of man, as the other do-  
 and I take Hoppes, though not sowne  
 if planted, and Saffron, and Hempe  
 because sowne, to pertaine as Corne  
 to the Executor. All those yet that  
 passe to one, to whom the Land  
 sold or conveyed, if not excepted  
 though never so neere reaping, or  
 ling, or gathering. But what if the  
 Wife had the Lease for yeers as Ex-  
 cutor to some former Husband or

Roots of Car-  
 roots, Parsnips:  
 Land sold  
 whereon is ripe  
 Corne.

er friend, and the Husband after  
 wing dyes, who then shall have the  
 orne? Certainly the Corne shall goe  
 the Executor of the last Husband, at  
 st so much as is more then the  
 res value of the Land, or the ma-  
 ng it up by addition of other things;  
 the value is to be asssets for pay-  
 ent of debts and Legacies. Put the  
 e againe, that the Husband and  
 33.H.6.31.  
 wife were joynt-tenants of the  
 nd, and then the very Corne grow-  
 g shall survive to her, together with  
 e Land, and though the Husband  
 wed it, yet shall it not goe to his Ex-  
 2. Eliz. Dy.  
 utor. Being in consideration of  
 ings growing on the ground, let us  
 t forget to thinke of Trees sold by  
 S. seised of the Inheritance of the  
 nd to I.D. who dieth before felling,  
 is Interest is a Chattell which shall  
 e to the Executor, and not to the  
 eire of I. D. but some colour may be  
 at these, because fixed to the soyle  
 d Freehold, are reall Chattells, as  
 e Interest in Land is, and not perso-  
 all: So also of Trees Excepted by  
 m who selleth the Inheritance of  
 e Land; but in both cases I con-  
 ceive

For he was Te-  
nant for life in  
effect.

The Wife also  
shall have con-  
venient apparel

Co. lib. 11. f. 48.

Of houses, or  
things about  
the house.

42. E. 3. 6.

21. H. 7. f. 26.

ceive this interest to be personally, not really; for that, as it is a property of Chattell in the Vendee or Vendee with exception, it stands in consideration severed, and abstracted from soyle, or ground where the Trees grow, though the Trees be not actually severed by the Ax from their Mother Earth. But if the Lessor for years or life except the Trees, these continue parcell of the Freehold and Inheritance. And after Corne reaped and before the Tithes set out, the inheritor of the Tithes dying, I think the Executor, and not the Heire, shall have the Tithes after set out.

Now Let us come home to the Statutors house, and see in and about some doubts, what pertaines to the Heire, and what to the Executor. Question hath been both of old and late, touching Coppers, Leads, Furnaces, Fats for Dyers, or Brewers, Palles, Rayles, Glasse in Windows, Tables, Dormants, Wainscots, Doores, Lockes, Keyes and such like, to whom they should goe? whether to the Heire or Executors? And in the latter end of Henry the 7. his time,

Exec

Executor taking a Furnace which  
 was set in the middle of a house, and  
 not fixed to any Wall, the Heire  
 brought an action of trespassse against 42. E. 3. f. 1  
 him for so doing, and it was adjudged  
 for the Heire, viz. that this was to goe  
 as part of the Freehold, & Inheritance  
 to the Heire; and long before in *Ed-*  
*ward* the third his time, it was deba-  
 ted whether it were waste in a Lessee  
 to remove or take away a Furnace or  
 not, but I find no opinion delivered by  
 the Judges: But in the late *Queens* time  
 Justice *Walmesly* said that the Lord  
*Byers* opinion was, that where the  
 furnace is not fixed to the Wall, the  
 lessee might within his terme take it  
 away. Contrarily if it were fixed  
 to the Wall, for then it strengthen-  
 eth the house, and yet notwithstanding  
 it might be in the one case so re-  
 moved by the Lessee, yet is it not  
 waste, as he said, a Chattell personall  
 moveable, so as it is attachable;  
 and there the case being that a Clo-  
 tier being a Termer of an house had  
 fixed a Copper to the Wall with  
 boomes and prickes necessary for his  
 occupation, a Judgement being had  
 against

*H. 37. Eliz. Au-*  
*stins case.*

against him, the Sheriffe delivered the Copper in execution as a Chattell, and after the Lessee took it up, and was taken from him by virtue of Execution; whereupon he brought an action of Trespasse, and by all Judges, the action was maintainable. And whereas it was found by the Jury that by the Custom of Kent, the Lessee might remove such a Copper; Justice Beaumont, said that without any doubt some a Lessee might so doe at all time during his terme. But it is to be noted in the said Case, that the Furnace was by it selfe delivered as a moveable Chattell, and not as part of the house, for that was not meddled withall, nor at all delivered in execution (as in the case between Miles and Prynne where both house & Copper were delivered upon a Statute) the house being held upon such a rackt rent, that the party did not desire to have the house for he might have had the whole being a Chattell, and so have used the Copper during the terme. And as touching all other fixed things, the Law was taken in the said case in Henry the 7. time, to be all one; as in the case of

Furnace, viz. that they should goe to the Heire, save onely that for glasse in the Windows, *Pollard* said it was otherwise, viz. that that should go to the Executors, which none there denied. But since, in the late *Queens* time it was otherwise resolved touching glasse, that it should not goe to the Executors, and the like was here said, touching Wainscots, and also by the Lord *Ander*, in the said case of *Austin* And touching Postsfixes for that they be parcell of the Freehold, so also of Millstones, Anvils, Doores, Keyes, Windowes, none of these be Chattels, but parcell of the Freehold, or thereto pertayning, therefore, not the Executors.

Now to come to Gardens also: Things in Gardens.  
Whereas, I before laid down a difference betwixt things sowed, or not arising from the Earth, without manuring, [and such as grow of themselves; will thence be concluded that the roots of Carrets, Parsneps, Turneps, Skerrits, and such like, coming and arising from yearly sowing, must go to the Executor, and not to the Heire; the case being so, that the

G                      Gard-



Gardner and Sower had the Inheritance of the Garden, or Soile, notwithstanding in most places this can rarely be a question of value, yet about London, and some great Towns it may be and therefore not unworthy of a line or two, a thought, or two, the rather for that the reason of this case may give light touching right in other Cases. And in my opinion, these, notwithstanding there is a sowing and manurance to generate them, and cause their being, shall goe to the Heire and not to the Executor: the reason, is for that the thing of profit is the root which is hidden in the ground and I hold it no reason, nor agreeable to Law, that the Executor should dig and breake the soyle and ground to search for her entrailes; he is to content himselfe with that which is above ground, as millions of all kinds and the like whose fruit is above the ground; but as for Artichoks, though the fruit be above the ground, yet they think they have no such yearly setting or manurance as should sever their interest from the soile, therefore the shall goe with it to the Heire.

Let us now consider of things; though not fixed to, yet usually kept in houses, viz. writings and evidences, whereabout generally, no doubt can be, but that they follow the interest of the Land, so as if they touch inheritance, they pertain to the Heire, if but Termes, Goods, Chattels, or Debts, they pertain to the Executor, yea so doe Statutes, and Bonds in Law (howsoever otherwise in equity) though they concern the assurance and enjoying of inheritance purchased. What if *A.* mortgage the inheritance of Lands to *B.* upon Condition of redemption by payment of 500. pound to *B.* his Heire, or Executor, and *B.* dyeth, the Deeds being delivered into his hands: now the Heire, nor the Executor, shall have them; for though the money may be paid to the Executor, yet meane time the Land descends to the Heire, nor is there any debt to the Executor, for *A.* may choose to pay, or not. Put it on the other side, that the Land had been sold for 500. pound, not paid to *A.* but a condition that if not paid to him, it should go to his Heire, or Executor, by such a day,

41.E.3.2.36.H  
6.26.18.E.3.4.  
3.H.7.15.

*Que.* If sole  
use that way  
make a differ-  
ence or not.

then to re-enter ; and *A.* dyeth: Here  
is a debt to the Executor, and no  
Land descended to the Heire of *A.* yet  
shall the Heire have the Deeds, for  
that a Condition is descended to him.  
Question hath bin touching Boxes &  
Chests where in the Evidences con-  
cerning inheritance are; and although  
the better opinion in our Books, doth  
pitch upon this difference, that where  
they are sealed up, they shal pertain to  
the Heire, otherwise, where not sea-  
led; I cannot conceive that difference  
to be grounded on good reason; but  
rather thinke that Boxes, which have  
their very creation to be the houses  
or habitations of Deeds, should, as  
appurtenant to them, go to the Heire,  
whether sealed or not. On the other  
side, Chests made for other use, viz.  
the keeping of Napery, or Apparell,  
shall not, as I conceive be taken as ap-  
purtenant to Evidences, because some  
be in them, for so may other things  
also be: Nor as touching them can  
sealing be of any effect, but rather  
locking, and not locking, must make  
the difference touching them, if any  
difference by inclosure.



## CHAP. VI.

Of things not actually in the  
Testator, but accruing to the  
Executors, by or after the  
Testators death.

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*These be of divers sorts , the First and  
chiefe whereof are things gotten and  
acquired by Action or Suite.*

2. *By Condition or Covenant with-  
out suite.*
3. *By Remainder.*

*Of things in Action.*

**T**O speake first of the  
first, it is cleare that  
debts due to the Te-  
stator, be it by Bond,  
Statute, or Judge-  
ment, or for Arrera-  
ges of Rent, are not assets to charge  
the

See Stat. 32. H.  
8. cap. 37. Re-  
medy for rents  
of Inheritance,  
or for life.

A Church of  
the Testators  
Inheritance,  
become void  
in his life,  
comes to the  
Executor as a  
thing in acti-  
on, but is not  
Assets, for not  
vendible.

the Executor, untill receipt of them,  
and it is as cleere that the Actions to  
recover these doe pertain to the Exe-  
cutor, and that the debt and damages  
recovered shall be assets to charge  
the Executor. So also of Actions of  
*Detinue*, and of covenant for any  
thing personall, or any Chattell Real,  
Lease, Wardship, or the like. But  
perhaps some will doubt of Covenant  
touching inheritance, viz. the assu-  
rance of Lands or enjoying there-  
of, free from this or that incom-  
brance or the like: Yet even in those  
cases, if the Covenant were broken  
in the Testators life time; I thinke  
clearly the Action is accrued to the  
Executor, for that his Testator was to  
recover dammages in the Action of  
Covenant for that breach, and he be-  
ing intituled to these dammages as  
principall, and not any accessory thing  
in that action, the Law hath cast that  
action upon the Executor. And that  
is the cause why, if waste be commit-  
ted in the life of the Lessor by his Les-  
see, and then the Lessor dyeth, his  
Heire can have no Action for this  
waste. viz. because he cannot reco-

ver the treble dammage, as neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heire.

11.H.4.32.  
45.E.3.3.  
No.na.br.59.

That an Executor at the common Law could not maintaine an Action of trespassse for goods of his Testator, taken away in his life time, seemes to be implied by the Statute in the time of King *Edward* the Third, which gives such action: Yet it seems that a *Replevin* was maintainable by the Executor, at least in some cases for goods taken or distrained in the Testators life time: But in case the distresses were for Rent, Service, it is said a little after the making of that Statute, that the Lord may not now avow for his Rent, or Service, because his Tenant is dead, but must set forth the matter, and thereupon justifie to excuse himself from answering damages, and the Executor shall by this Action recover the Cattell or Goods, and that by the Common Law, saith the Book, though the Statute of *Marebridge* had never been made, for that the property remained in the Testa-

4.E.3.c.7. And  
the like given  
to Executors  
of Executors.  
per.stat.25.E.3.  
c.5.

17.E.3.Fit.  
106.

cap.21.meant  
ut credo.

21. H. 6. 1. but  
Markham è  
contra.

21. H. 8. cap. 19.  
4. E. 3.

The Bish. of  
Covent. & L.  
and Sales case.  
M. 32. & 33  
Eliz. in com ba.  
So of Ravish-  
ment. Dlgard.  
7. H. 4. 2. & 7.  
H. 4. 6. Erest.  
Firm. & Til.  
De clauso fra-  
cto, meerey it  
lyeth not.  
11. H. 4. 3.

tor. Note it speakes not at all of the  
said Statute of 4. Edward the 3. But  
Newton in the time of King Henry the  
6. would have it that the Executor in  
that case should not have a Replevin  
but an Action of Trespasse grounded  
upon the said Statute, viz. 4. Ed. 3.  
Which me thinkes cannot be by any  
means, by reason of the Statute of  
Marlebridge. cap. 3. *Non ideo puniatur  
dominus, &c.* for the Executor, as well  
as his Testator, is thereby restrained.  
I thinke, from the Action of Trespasse  
against the Lord. As for that no Ac-  
tion of Trespasse can be made upon the Tenant  
that is now remedied by a late Sta-  
tute: The other Statute hath been re-  
aken to extend to other things than  
Goods moveable, for where a Church  
becomming void, a stranger presented  
thereunto wrongfully, and the Parson  
thereof dyed, it was resolved in the late  
Queens time, that the Executor  
might by the equity of the said Sta-  
tute, maintaine a *Quare impedit*. But  
whether an Action of Trespasse lyeth  
for an Executor, against him who  
spoiled the Testators Corne, Grass,  
or Wood, growing, hath been que-  
stion-

tioned, but no where resolved to  
 my knowledge. I thinke it may lie  
 with some difference: First, for that  
 the Statute of 4. *Edward the Third*,  
 doth not only speak of Goods carryed  
 away, as limmiting the Law to that  
 Trespasse soly and particularly, but  
 speaks generally of Trespasse done to  
 Testators; and then brings in that  
 particular of goods, as one Instance.  
 Now there be many cases of instances  
 or ensamples given in acts of Parlia-  
 ment, which yet doe not restraine the  
 Remedy or *purven* to that particular,  
 from extending to other cases, of  
 like nature. Thirdly, the Statute  
 speaks of Trespases remaining un-  
 punished, which it meant to redresse:  
 that it should still leave many unpun-  
 shed, if it should have no larger ex-  
 tent, than to that one singular Tref-  
 passe, of Goods taken away, *viz.*  
 moveables. Againe, the Testator  
 was clearely intituled to a recovery  
 of damages for this other Trespasse,  
 which if hee had recovered, should  
 have come to his Executor: Yea the  
 things themselves, all, if sold in the  
 Testators life, and part, though not  
 sold,

This *Periam.*  
*Just.* did very  
 judiciously urge  
 in *Sales* case  
*supra.*



felled, should have come to the Executor, therefore also the damages recoverable in lieu thereof, out of which recovered, the debts and Legacies of the Testator are to be satisfied. Besides, this Action of Trespasse is nothing severed from the state of the Land, so as if the owner thereof had after this trespassse done, aliened the Land, yet had this Action remained to him, as I take it, clearely. And why not as well as where a Trespasse is done upon the Land of the Lessee, and then the terme expires, the doubtlesse doth not take away the Action, nor his Executors. But some thinkes here may be some difference probably taken, as first between a Trespasse in destroying or taking away Corne growing, and a trespassse in Grasse, or Wood growing: for the first being of that nature, as though the Owner had a state of inheritance in the Land whereon it groweth, and should have dyed before the verance and felling, Yet it should have gone to the Executor, and not with the land to the Heire, therefore doubtlesse doth the Action for a Trespasse

by the operation of Law to the  
 Executor, in lieu of the thing taken  
 destroyed. Otherwise, perhaps  
 Wood or Grasse, Which by the  
 owners death should have gone to  
 Heire, and not to the Executor.  
 yet here againe another differ-  
 ence me thinkes may be betwixt  
 Grasse and Grasse, viz. betwixt that  
 Pasture, and that in Meddow, yeer-  
 mowed, and turned into Hay, not  
 to be consumed by the mouthes of  
 beasts, as that growing in pasture. For  
 the Law distinguisheth betweene  
 these Soyles, gives precedency to  
 Meddow, and makes it waste for a  
 while to Plough it up, not so for Pa-  
 sture, Yea Tithe is payed of Hay, but  
 not of Grasse growing in Pastures, so  
 the Meddow Grasse being in the  
 owners purpose and intention, as a  
 thing severed from the soyle, should  
 be so also in the eye, and  
 estimation of the Law, and therefore  
 in a different state, and account  
 from Pasture Grasse. A third differ-  
 ence may bee in the manner of the  
 destruction, viz. Where the Meddow  
 Grasse

At least me  
thinks; Action  
upon the case  
here and be-  
fore should be  
maintainable.

Grasse is eaten up with Cattell by  
Trepasser, and where by him mo-  
ed and carryed away as Hay, for in  
latter case, an Action of *Trover*  
*Conversion* for so many loades of  
is doubtlesse maintainable by the  
ecutor, though it should be admit-  
that in the other case of consump-  
by the mouthes of beasts with  
severance, no Action should  
maintainable by the Executor  
which yet I admit not, but thinke  
the contrary probable. For whe-  
Meddow ground, which year  
conceiveth (*Sol sine homine genera-  
bam*) shall be ready to be deliver-  
of her burthen, if a stranger putting  
an head of Cattell, which swallow  
and treade down this fruit of  
wombe, before the Mower with  
sicke, come as a Midwife to helpe  
delivery, if then by the hasty death  
the Owner, before action brought  
this great Trespasse should be dis-  
nishable, it were contrary, as I  
thinks, to the purpose of the said  
tute, and a great defect in the Law.  
Yet here perhaps touching this,  
fourth difference may be, or arise

the time of the death of the Ow-  
*viz.* where he dyeth before time  
 Mowing, and where not ; for *Dato*  
 in the former case, because if such  
 ruption or consumption had not  
 ; yet the Owner dying before  
 erance, this should not have come  
 the Executor, but have gone with  
 soile to the Heire, that therefore  
 Executor, who is not dam-  
 ed should recover no dammages.  
 in the other case, the Owner li-  
 g till after Hay time clearly passed,  
 till the end of *August*, me thinks  
 w since this fruit of the Meddows  
 mbe should have been a Chattell  
 ered, had not this Trespasser made  
 lawfull prevention ; Therefore the  
 ecutor, to whom the same should  
 ecome, towards the performance  
 the Will, should have out of  
 e said Statute, an Action and reme-  
 , reached unto him to recover re-  
 mpence in dammages for this wrong  
 ne in *retardationem Executionis Te-*  
*amenti.* A fifth and last difference  
 y perhaps be in the state of the ow-  
 , for *Posito*, that where the Land is  
 freehold, or Copyhold Inheri-  
 tance

tance, no Action should be given to his Executor, for Wood, or Goods taken or destroyed in his life time, yet where he is but Tenant for years, Guardian, or Tenant by extent, in the very state in the Land was come, and is come to the Executor (together with *Quicquid plantatum est*) me thinks the Executor should have, together with the state in the soyle, the action to punish the Robber of, or Trespasser upon the Goods. Thus having scanned and sifted, to the best of my ability, all differences and circumstances of this point, how far I am wide, and wherein right, *Alibi sit iudicium*, or rather, *Alibi esto iudicii*. But this is cleare, that wheresoever Executors doe recover any damages for trespassse or other wrong done to their Testator, or money recovered (at least, if Executors be had, or money received) will be Affets in their hands, as well as damages recovered upon Bonds or Bills, Lands, by them taken in Extent upon Statutes, Recognizances, or Judgments. Yea, without ever having these moneyes, Executors may make

3.H.6.3. Littleton f.42.a.

So held in Sales case of damages in *Qua. impe.* recovered conte. of the presentment. Releasing.

em assets in their hands, *viz.* by  
 making Releases, or Acquittances, or  
 acknowledgement of Satisfaction, for  
 as amounteth to a Receipt, and  
 argeth the Executors towards the  
 creditors with the whole penall sum,  
 ough happily they receive but part,  
 the principall, or some like pro-  
 portion. Therefore, there is great  
 caution to be used by Executors in  
 this kinde, that unlesse they be sure  
 they have Goods sufficient to pay all  
 debts, and Legacies, they make no  
 release, Acquittance, or Acknow-  
 ledgement of Satisfaction, for more  
 than they doe receive, be it debt or  
 damages. And the like caution to  
 be used by them, touching submission  
 of debts or damages, to arbitrement  
 whereby discharges of the same may  
 be had, for the submission to the Ar-  
 bitrement, being their voluntary act,  
 though the Arbitrators by their  
 judgement doe discharge the debt or  
 damage in part, or in whole, yet  
 all the Creditors have like remedy  
 thereupon, against the Executors, as  
 they had released, or, which is more  
 received the same.

13.E.3.Fir.91

Other

Other Actions there be of charge, which as the Testator himself in his life time might have had, so may his Executor after his death, viz. Writs of Error, Attaint, Disceyt, *Adita Quærela, identitate nominis*. But this last is given by Statute. Whatsoever is regained by any of the ways, as unduely lost by the Testator, shall also be Assets.

### Speciall cases pertinent to the premisses.

1. *Chattels come to Executors from Testators, yet not Assets.*
2. *Assets which be no Chattels.*
3. *Things in Action, and in the personality turned into Chattels Real & è contra.*

**A**S to the first, I exemplifie thus. *A* makes *B*. his Executor, and dies, *B*. makes *C*. his Executor, and dies. The Goods left by *A*. to *B*. as Executor, farre exceeds his Debts and Legacies, or let us suppose no Debts nor Legacies of *A*. and that

dyeth much in debt, above the Goods  
 he leaveth, and did make no alteration  
 of the property of the goods of *A.*  
 but meerly left them to *C.* his Execu-  
 tor. Now shall not the goods which  
 came to *B.* as Executor of *A.* and so  
 from *B.* to *C.* be lyable in Law, to  
 pay the debts of *B.* yet in Conscience  
 he thinks they should, and that *C.*  
 should not receive them to his owne  
 use, as in Law he may, where *A.* left  
 no debts. But if *A.* making *B.* Exe-  
 cutor, did also by his Will give him  
 all his Goods, and he in his life time  
 made election to have them as Lega-  
 tee; or by his Will, did so dispose of  
 them, or appoint them to goe, as the  
 goods he had as Executor, could not  
 be given or disposed: Now by this e-  
 lection they were altered in property  
 from being his as Executor, and so as  
 his own goods should be liable to his  
 debts. But things in action could  
 not be given, or disposed, viz. Debts,  
 yet if *D.* were indebted to *A.* one  
 hundred pound, and *B.* his Executor,  
 took new bond of him, or another  
 for it, giving up the old Bond,  
 now was it become his own duty  
 H and



Or if a stranger usurp in his life, and he dying, his Executor recovers in a *Qua. imp.* as by *Salé* was done *infra*, *Mich. 32. and 33. Eliz.* So held in *Sales Case*, in *com. ba.*

*Vendere jure potest emerat ipse prius.*

and so shall stand in his Executor

Another instance of this, thus: *A.* patron of the Church of *D.* grants to *B.* the next avoidance; the Church becomes voyde, *B.* dies before he presents, his Executor presents, and has the benefit of preferring his sonne or friend, yet shall this make no Affet in his hands for payment of debts, so that he could not lawfully take money to present. But if *B.* had died before the Church had become voyde. Then because the Executor might lawfully have sold it, the value should be Affets in his hands, as I conceive except perhaps the incumbent had died so hastily after *B.* that the Executor had not time convenient to finde out a chapman, and to sell it.

If in the other Case, a stranger had presented, & got his Clark admitted & the Executors of *B.* had in a *Qua. Imp.* recovered dammages, the money so recovered should have been Affets. Thus much of the first, viz. that some things of the nature of Chattells may come to Executors and yet not be Affets.

Touching the second, viz. the

Some things may be Assets in the hands of Executors, which yet are no chattells; I shall give but two Instances. First, where a man leaveth a Villen for yeares to his Executors, and the Villen purchaseth Land in Fee-simple, and the Executor entreth into the Land; now hath he Fee-simple therein; and this Land is Assets for the payment of the Testators debts. So, if a man by his Will give Lands in Fee to his Executors to be sold for performance of his Will: these (before the money thereby raised) are Assets, both for payment of Debts and of Legacies: But if the Lands had been given to be sold only for payment of debts, they should only be Assets for that purpose, and not for payment of Legacies: and so, if it were expressed to be for payment of Legacies, singularly, this should not be Assets for debts, as I take it. For since these are not Assets of their own nature, but so made by the Will and disposition of the Testator, me thinks they cannot be otherwise, nor farther Assets than as the Testator hath willed and disposed; but though Lands

22.H.8 Bro.  
Villenage 46.

If he dye, how shall this be Assets in the Heire?

3.H.63. and so  
2.H.4.21.  
If by Feoffment per Mark-  
am, cap. Just.  
contra Rickhill.

See 9. El. Dy.  
264.

thus given were Assets before the  
*Stat. 21. Hen. 8. cap. 5.* Yet how can  
 it be so since, for the very words of the  
 Statute be, That if one Will by his  
 Testament or last Will any Lands, &c.  
 to be sold, neither the money there  
 coming, nor the profits taken, shall  
 be accounted as any of the goods or  
 chattells of the Testator; which  
 conceive to be all one, as to say, that  
 they should not be Assets; for when  
 an Executor denieth himself to have  
 Assets, the forme of his plea is, *Quia*  
*nulla habet, bona nec catalla, &c.* Yet  
 since that Statute, viz. in the late  
 Queenes time, the Law was twice  
 admitted, or conceived still to be ac  
 cording to the third of *Hen. 6.* viz.  
 that the Land devised to be sold, or  
 the money thereof coming, should  
 be Assets. Indeed, in neither of those  
 Bookes is there any mention of the  
 clause in the said Statute; and it is  
 possible that it might be forgotten,  
 in other Cases sometime hath hap  
 pened. But casting about how to  
 concile those Bookes with the said  
 Statute, and not to suppose the same  
 forgotten at both times, both at the

9. *El. D.* 264.14. *El. D.* 31.

Barre and Bench ( though being but a short clause in the middle of a large Statute to other purpose, it might well so have been ) at the last, though not hastily, I grew to conceive, that the said clause being in an Act which limiteth the Fees of Ordinaries, and their Scribes, according to the value of the goods of the deceased, and then bringeth in this clause, That the Lands willed to be sold, shall not be accounted as any of the goods, &c. The Parliament meant thereby only to exclude them to this purpose, that they should not be accounted as part of the goods in the valuation, according to which the said Fees were to be rated; and though the words be generall, That they shall not be accounted as any of the goods, &c. yet is it the more probable, that the Parliament meant no further then as aforesaid, because that clause after the Fees limited in answerableness to the values, is brought in by a *Proviso*, viz. Provided alwayes, that if the deceased Willed any Lands to be sold, the money nor profits shall not, &c. and thus perhaps it was understood

and construed in the said late Queen's time, though no mention be of any remembrance of that clause or provision in either of those Cases reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the personalty, into the realty, and *è contra*, I shew it thus. If a Debt were due to the Executor as Executor by Statute, Recognizance, or judgement, and he had Execution, and have Land of the Debtors in extent: now is the personal duty turned into a Chattel real. On the other side, if such an estate by extent, or a Lease for years mortgaged come to an Executor, and the debtor, or mortgager payeth the money due; now are these chattels turned into Assets personal.

*Another speciall Case of Equity opposite  
Law.*

**I**F *A.* be bound to *B.* by Bond, Statute, or Recognizance for assurance of Land, *B.* dieth, and the Land descends to his heire; or be it that *B.* sold the Land to *C.* and assigned

him the Bond, Statute, &c. yet must  
 the Suit, or taking out of Execution,  
 be in the name of the Executor of *B.*  
 and neither of the heire, nor Assignee.  
 And that which is recovered, or got-  
 ten in extent, will be Assets in Law to  
 charge the Executor, as I take it, yet  
 in equity it pertaines to the Heire or  
 Assignee. *Quare*, If the Executor  
 meddle not, but onely suffer his name  
 to be used.

*Of things come to Executors by  
 Condition.*

First, we will consider of Condi-  
 tions bringing backe to Executors Note Diff.  
 goods, or Chattels granted away by  
 their Testators. Touching which,  
 there is no doubt, but if the Condi-  
 tion be any other than for payment of  
 money, or other things valuable by  
 the Testator, or his Executor, the  
 Chattell returning to the Executors is  
 Assets in their hands: as put the Case  
 Lease for years, Horses, Sheep, Plate,  
 or other Chattell, were granted by  
 the Testator to *A.* upon condition,  
 that if *A.* did not pay such a summe of

money, or doe such other Act as the Testator appointeth, and this condition is not performed after the Testators death, now is the Chattell come backe to the Executor, and is Assets. But the Question hath been (and perhaps may be) where the condition is that the Testator or his Executors shall pay the money to make void the Grantee, and accordingly, the Executor after the Testators death, payeth the summe out of his own purse, not having any money of the Testator in his hands: in this Case comming in question, *tempore Hen. 7.* It was resolved at the last, that this redeemed Chattell should not be Assets, but be to the Executor as his owne proper goods, though at the first, three Judges were of contrary opinion, *viz.* that the goods redeemed should be in the Executor, as goods of the Testator. And truly I must confesse that I can not yet finde good satisfaction in the *Bookes* resolution, except we shall take the Case there to be such as that which is put and reported by the Lord *Dyer, tempore Hen. 8. viz.* that the money paid for redemption, was as much

21. Hen. 7.

the full value of the goods, pledged,  
 or mortgaged, or else shall admit the  
 case to be, that this redemption was  
 not by payment at the day condition-  
 ed. As to the first, it were rare, that  
 any should lend money upon a mort-  
 gage, where the thing mortgaged, is  
 not of better value than the money  
 lent: rare also, that an Executor  
 should take care to redeem with his  
 own money, that which should yeeld  
 no benefit or advantage to him, or  
 his Testator. Let us therefore scan  
 and examine the Point, since the same  
 may come frequently in use; and this  
 we may the more decently do, because  
 the Lord *Dyer* in the Margent of the  
 case by him reported, as aforesaid,  
 hath expressly, that the said other *temp.*  
*7.* was not at all adjudged, himselte  
 having veiwed the roll, which he there  
 sets down, and names the parties. We  
 will therefore put the Case thus. *A.*  
 possessed of a Lease for sixty years, of  
 one hundred pound Land, mortga-  
 ged it for five hundred pound; or  
 so it that the mortgage or pledge be  
 of a Jewell, or peece of Plate for halfe  
 the value, and that before the day li-  
 mit-



mitted for payment, and redemption. *A.* having made *B.* his Executor died, and *B.* at the time & place maketh payment, as was conditioned. Now the question is, whether this Lease, Plate, or Jewell, being worth much more than the sum for which it was mortgaged, shall be in him wholly in his own right and to his own use, or partly if not wholly as Executor to *A.* as to be subject to the payment of debts and Legacies. Here it must be clearly admitted, that *B.* was inabled to this redemption onely, and made by the Condition annexed to the mortgage, or pledging. It must also be admitted, that this Condition, and the power or Interest to take benefit thereof to him; came and was derived onely as Executor of *A.* This being premised, it must needs follow, as me it seems, that the condition working, and having his operation in the redemption to destroy the Grant of mortgage, or pledging, it must needs make these again the testators goods *in statu quod prius*, and so to be in *B.* as Executor; since in that right onely, he was intituled to take benefit of the

Condition. For what is it which  
considered before this, from being the  
testators goods; nothing certainly,  
but only the force and strength of the  
mortgage or pledge: Now by the re-  
demption, that is become void, and  
hath lost its force; therefore the pro-  
perty of these things must needs now  
be; as if no such mortgage or pledge  
had been; or as if it had at the first  
been void, and of no force: Thus  
must the Condition worke for him,  
who made it, viz. A. the Testator: and  
in case of the contrary opinion in the  
time of King Henry the Seventh, doe  
not say, That by this redemption, the  
testator is so much indebted to the  
executor, as he disbursed for the re-  
demption; which could stand with no  
reason, unless by it the property and  
interest should be reduced to the Te-  
stators behoofe. That thus it is, is  
so proved, as to me it seems, by the  
case of mortgage of Inheritance, upon  
which the Heire making payment, ac-  
cording to the condition, is not now  
in a new purchaser, but as heire,  
as he shall have his age, and be in  
ward, even for this Land: Yea, it  
shall

shall be Affets in his hands for satisfaction of his Fathers, or other Ancestors debts, which in some respects is a harder Case than that of the Executor; for he hath meanes to satisfy himselfe of the money disbursed, either out of the thing redeemed, or other goods of his Testator, but the Heire hath no such meanes. Yet will be asked, how the Executor can be free from mischief, for if the thing redeemed be intire, as the Case of the Lease, the whole will be taken in Execution for the Testators debt. To admit this, yet here is one cleare way of remedy, viz. the Executor may before such Execution, sell the thing, and so pay himself, and retain the surplusage to the Testators use, and the like of this is frequently in use, viz. for Executors to pay the Testators debt with their own money, and to make themselves satisfaction out of the Testators goods. Besides, it is not impossible, that this redeemed thing should be taken in Interest parted, that answerably and proportionably to the summe disbursed for redemption, with reference

the value of the thing redeemed, a  
 moyete or third part, or three parts  
 thereof should be to the Executor in  
 his owne right, as his owne proper  
 goods, and the rest in him as Execu-  
 tor. As *posito*, that *A.* and *B.* were  
 tenants in Common of such an entire  
 chattell: *A.* maketh *B.* his Executor  
 and dyeth. Now hath *B.* one moye-  
 te as Executor, and another as his  
 owne proper, and upon a Judge-  
 ment against him as Executor, that  
 moyete onely which he hath as Exe-  
 cutor, must be taken in Execution;  
 and here may be remembred, how in  
 execution of a Judgement, or levying  
 an Amerciament out of an intire  
 chattell of more value than the sum  
 to be levyed, the whole is to be sold,  
 and the surplussage above the debt or  
 amerciament is to be delivered back  
 to the owner. For in all this debate,  
 we must presume the thing redeemed  
 to be of better value  
 than the summe payd, else wee may  
 easily admit the whole to the Execu-  
 tor. Againe, the Lease for yeers, is  
 so intire a thing; I meane the  
 lease and let, but that thereof partition  
 may

may be made; yea inforced by Act  
 on between joynt-tennants, and Ten-  
 nants in Common: But here will  
 objected, the Case of redemption  
 the Daughter and Heire; who though  
 she have a Brother borne after; so  
 now she is no longer Heire, yet she  
 shall, as the Book saith, retaine  
 Land redeemed from the Heire, as  
*Perquisite* or Purchase. As for  
 (which I will not oppose) the Law  
 so frameth to the favour of the Daugh-  
 ter, because of great mischief to her  
 if being stripped of the rest of the  
 inheritance by the birth of a Brother  
 shee should also lose that which her  
 money had redeemed, without having  
 any remedy to have her money again  
 or any recompence for it; but in  
 other Case, there is no such mischief  
 for that the Executor may pay him-  
 self, as hath been shewed.

Now on the other side, if the Case  
 shall be understood, that the redem-  
 tion was by payment after the death  
 then will I easily admit that the prop-  
 ertie or interest, is in the Executor  
 to his owne use; or that the Condi-  
 tion, now having no power to redem

back, or to operate any thing : It  
rather a re-emption, than a redemp-  
tion, since it was at the Will of the  
Mortgagee, to dispose it at his plea-  
sure, and any stranger, as well as  
the Executor might thus have re-  
deemed, viz. repurchased it, therefore  
only Equity and not Law in that  
case can make any part of the value  
Assets in his hands : and so also I think  
we should admit in the other Case  
payment, at the day that the pro-  
perty of the Chattell is to the Execu-  
tor as his owne, and not his Testa-  
tors goods, no part of surplusage of  
value, can in Law be Assets, howsoever  
in Equitie.

Lastly, if the Executor redeem by  
payment at the day with the Testa-  
tors own money or goods, none will  
doubt, but that the thing redeemed  
be in him as Executor, and the money  
him payd for redemption is well  
administred, the goods redeemed be-  
ing of better value. But this way it  
makes no difference, whether the  
whole value of the goods redeemed,  
shall be held Assets ; and the money  
payd for redemption stand drowned  
there.

therein, or that that summe be adjudged in the hands of the Executor, as Assets, and only the surplusage of the thing redeemed over and above the summe payd for redemption.

*Things accrued by Covenant or Assumption.*

**I**F *A.* Covenant with *B.* to give him a Lease of such or such Land by such a day; and *B.* dieth before that day, and before any lease made; then must *A.* make the Lease to the Executor of *B.* and the Lease so made to him, shall be in him as Executor, and consequently as Assets. This is proved by the Judgement, in the Case betweene *Chapman* and *Dalton* in the late Queens time. Yet I confess that it is not expressed in the resolution of this Case, that this Lease should be Assets, but that the Executors should have the Terme as Executors, which implyeth as much to my understanding; and the declaration, whereupon the Defendant surrenders, sets forth the breach of the

*Plowd. Com.*

Con

Covenant to be in *retardatione executionis testamenti* : so as the dammages thereupon recovered, viz. 300. and 10. pound were Affets, and consequently also, should the terme have been in lieu and recompence whereof these dammages were given. The like Law, if *A.* assume upon good consideration to deliver in to *B.* by such a day twenty Quarters of Wheat, or so many loades of Coales or Wood, or any other Wares or Merchandise ; and this is not performed in the life of *B.* but after to his Executor, it shall be to him as Executor, and shall be Affets in his hands, as well as the money recovered in dammages for not performing should have been.

*Of things accrued by remainder,  
or increase.*

If a Lease be made to one for life, and the remainder to his Executors for years, and he dieth, this will be Affets in the hands of his Executor, though it were never in the Testator, if it was in the latter end of the late



Queens time, resolved by three Justices, the Lord *Anderson* only being of a contrary opinion; and there it was said, that *Craumers* Case, where the contrary in effect was resolved was of little authority; for that there were first two Judges against two, and after, *Mounson* changed his opinion upon a conceit, that there the effect was by way of use, which could make no difference: Like law, where a Lease for yeers is by Will bequeathed to *A.* for life, and after to *B.* who dieth before *A.* Although *B.* never had this terme in him, so as that he could grant or dispose it, yet the use it rest in his Executor, as his goods and be Affets. As for a remainder for yeers, so in the Testator, that he might grant or dispose it at his pleasure, no doubt can be there, though the same fell not in possession to the Testator in his life time, yet no scruple nor doubt can be, but that this is Affets to the Executor, even whilest it continues a remainder, before it falleth into possession, because it is presently valuable and vendible. Nor much of other nature

these are the Cases, where the Execr.  
 merchandizing with the goods of his  
 testator, maketh gaine thereof. So if  
 the Sheepe, or other Cattell of the  
 testator doe breed, viz. beare Lambs,  
 calves, Colts, &c. After the Te-  
 stators death, even these which were  
 ever in the Testator, shall yet be Af-  
 fets, and so the Wooll growing upon  
 the Sheep after the Testators death.  
 that there is one Case worth the con-  
 sideration, and worthy of some doubt  
 I thinke, and that is this. One  
 giveth to his Executor a Lease for  
 years of Land, worth twenty pound  
 a yeere, and the Executor keeping  
 it in his owne hands, one yeere af-  
 ter the Testators death, doth make  
 thereof thirty pound in cleere gaine  
 after all charges, now whether, as  
 a Creditor, this whole thirty pound  
 shall be Affets, or only twenty pound,  
 if the Case simply thus put, shall  
 be understood of an occupying, and  
 enjoying without any stock of the  
 testators; and then if the Executor  
 stocke it with his owne Sheepe,  
 or other Cattell, as hee must have  
 to make the losse by rot or death; so is

11.H.6.35 per  
 Babington.

it reason, that if the manurance prove  
 gainefull, he reape the fruits thereof  
 in recompence of his adventure, and  
 of his industry, skill, and good  
 bandry. But if the Testators share  
 of Sheepe and cattell were (as of  
 cessitie, or for the better advantage  
 the Testators estate) continued in  
 the Lease Land, then is it reason,  
 the gaine or losse, whether it come  
 them God sendeth, doe redound  
 the Testators estate. Like Law,  
 thinke, if an Executor finding,  
 he cannot instantly, after the Testa-  
 tors death, let the Lease Land  
 the value, shall therefore buy  
 Corne, and hire the plowing, &c.  
 it may be said, that the Lease hath  
 entire valuation at the first, upon  
 appraisement. To this I answer  
 first, that the value upon the apprai-  
 sement is not binding, nor much re-  
 spected at the Common Law, if it be  
 high, it shall not prejudice the Exe-  
 cutor; if too low, shall not advantage  
 him; but the very value found by  
 ry, when it comes in question, whe-  
 ther the Executor have fully admini-  
 stred, or have Affets or not, is

which is binding. Next I say, that  
long Lease come to Executors, of  
and worth an hundred pound by  
year, and no sale is made thereof by  
the space of a yeere or more, now the  
time continuing of the like value, as  
first, it is no reason but this hun-  
dred pound raised the first yeere,  
should goe towards the payement of  
debts and Legacies rather then any  
other should be unpaid. This thing,  
meane the knowledge of them are  
full two wayes, viz. First to give  
power to Executors, to discern what  
is due to them of right pertains : Next to  
show unto Creditors and Legatees,  
what and how far things shall be Af-  
fected, that is to say, goods to enable,  
charge and binde Executors to pay  
debts and Legacies. For whatsoever  
of these wayes cometh to the  
Executors from their Testator, or is  
recovered by any of these Actions,  
shall be in their hands Assets, the  
cost and charges of recovering de-  
ducted.



## CHAP. VII.

*What manner of Interest an Executor hath in his Testators Goods Chattells, and how different the common Interest they others have in their owne goods.*



He Interest which an Executor, hath in the Goods of his Testator is much different from the absolute, proper, ordinary Interest, which every man hath in his owne proper goods, may well appeare in and by the points, First, although if a stranger take away these goods, the Action of Trespasse for the Executor is of generall Sort, *Quare bona sua* calling them his goods, whereas an Outlawed in Debt, &c. or com

or attainted of felony or treason,  
 forfeiteth all his owne goods, yet  
 these which hee hath as Executor, <sup>32.H.6.34.</sup>  
 shall not bee forfeited. If a Vil-  
 len be made Executor, his Lord  
 cannot take these goods, though  
 he may take all the Villens owne <sup>Litt. tit. ville-</sup>  
 goods: and for taking such Goods, <sup>nage.41.42.</sup>  
 or for a debt due to the Testator, a  
 Villen may sue his Lord. Nay, if the  
 Executor grant all his Goods, some  
 good opinion hath been, that these <sup>10.E.4.fo.1.</sup>  
 which he hath as Executor, should <sup>Yet 39. H.6.</sup>  
 not passe: yea, the Lord *Dyer* so held <sup>f.15. A release</sup>  
 in the late Queenes time, with this <sup>of all actions</sup>  
 difference, *viz.* Where the Grantor <sup>by an Execu-</sup>  
 is named Executor in the Grantee, <sup>tor extincts</sup>  
 where the Goods which he hath as E- <sup>actions as Exe-</sup>  
 xecutor should passe, but otherwise <sup>cutor.</sup>  
 if he be not named Executor in the  
 Grantee: and that this opinion is pro-  
 bable, will further appeare by that  
 which followeth.

But *Frowicke*  
 is against it in  
 20.H.7.Kel.64.

Secondly, the Executor cannot by  
 Will give or bequeath the Goods he  
 hath as Executor, and if he dye inte-  
 state, and Administration of all his  
 Goods is committed to *I.D.* yet hath  
 nothing to doe with the Goods

which the Intestate had, as Executor to his Testator : Thus all his Goods reacheth not to his goods as Executor.

See these so resolved in *Plow. com. 525. inter Bransby & Grantham. P. 20. Eliz.*

Thirdly, whereas a mans Goods stand liable to the payment of his debts, both in his life time and after. The Goods which a man hath as Executor, are not to be taken in Execution for his owne debts, either upon a Recognizance, Statute, or Judgment had against him. And if such one die indebted, leaving to his Executor much Goods, which he had as Executor; these are not Assets in his hands, lyable to the payment of his debts, but only for the payment of the first Testators debts or Legacies. Therefore a *Quo min.* brought by an Executor, shewing that he was not able to pay the Kings debt, because the Defendant detained from him an hundred pound, which hee owed him as Executor to *I. S.* was overthrowne, for that it could not be intended, saith the Booke, that the Kings debt could be satisfied with that which the Plaintiff should recover, and receive as Executor. Whereas a Woman being

pos-

possessed of any Chattels personall,  
 viz. moveable goods, all be devested  
 of her into her Husband by her  
 marriage, so as if he die, and she over-  
 live, they be not hers againe, but her  
 Husbands Executors, or Administra-  
 tors, and if she dies, all be the Hus-  
 bands without being Executor to his  
 Wife. It is not so of Goods which  
 she hath as Executor, these still re-  
 maine in and to her, if her Husband  
 die, and if she her selfe dye, for that  
 she hath them as it were in another  
 right, viz. as she represents the per-  
 son of her Testator, her Husband shall  
 not have them, if he be not his Wives  
 Executor, and so Executor to her Te-  
 stator.

Lastly, whereas the Writ of Tre-  
 vasse seems to make no difference be-  
 tween ones own Goods, and those he  
 hath as Executor, that being a posses-  
 sory Action or suit grounded upon  
 the possession; yet come to an Action  
 of debt, which more tastes and partici-  
 pates of the right, and there are they  
 differenced: for where for my own  
 debt, when I sue, the Writ saith *Debet*  
*detinet. viz.* that the Defendant

This may be  
 in his name  
 onely out of  
 whose possessi-  
 on the goods  
 were taken.

OWS



Calib. 5. f. 32.

owes me, and detaines from me the summe. Yet when I sue as Executor the Writ saith not, *debet*, he doth owe me, but *detinet* only, he detaines from me, as admitting that he is not a Debtor to me, though he should pay me; and so where I am sued as Executor, the Writ makes me not a Debtor but a detainer; Otherwise, where by my own right, I owe and am sued for a Debt. Accordingly, where Judgement in an Action of debt is given against one as Executor, it is not generally that the Plantiffe shall recover against him, but he shall recover of the Goods of the Testator, and therefore upon this judgement no *Capias* lies against him, to inforce him to pay the Arrest of his body, because he is not properly debtor, but if after it be returned that he hath wasted the Testators Goods, out of which the said debt shall be satisfied; Then he having made himselfe a Debtor, *Capias ad satisfaciendum*, shalbe awarded, against him, and then he shall be taken in Execution. So also in some cases of false plea pleaded, for where the judgement is *de bonis propriis*, the Plantiffe

may have a *Capias ad satisfaciendum*, 34.H.6.45.  
 and that judgement is in diverse cases  
 for the damages, although not in  
 many for the principall. As for the  
*Capias* before judgement, in the mean  
*proesse* against an Executor, that is,  
 because of his Contumacy in not  
 appearing upon the former *pro-*  
*esse*.

The reason of this different inte-  
 rest between an Executor and ano-  
 ther, or between the same mans ha-  
 ving goods as Executor, and others  
 in his own right; as also of the diffe-  
 rent manner of ones being indebted *Co.lib.9. 88.b.*  
 as Executor, and otherwise in his own  
 right, is well expressed by the Lord  
*Cooke*, in *Pinchons* case, viz. First, that  
 the goods which one hath as Execu-  
 tor, he hath not in his own right, but  
 in *auter droit*, that is, in the right of  
 another, meaning his Testator. Se-  
 condly, that Executors are but the  
 Ministers and Dispensers, or Distribu-  
 tors of their Testators Goods. *See this also*  
*Plow.co. 520.a.*

*Of alteration of propertie in the Executors hands, so as some goods become his owne, which he had as Executor.*

**T**O this head or Chapter, treating of the difference between the Interest in Goods, as Executor, and others had meerly in ones own right, and to his own use, it is not impertinent, to consider how that which one hath at first as Executor, may be changed in property, and become the Executors own to his own use, as other his goods, which he had not as Executor. Here let us first consider of ready money left by the Testator: for since pieces of money, viz. shillings, groates, pieces and half pieces of gold, cannot be known one from the other, it must needs follow that these coming to an Executor from the Testator must in some sort be altered in property, so as though the Executor shall be said to have so much in money or value, yet can it not be discerned which money in his house was his Testators, and which his own. Consequently

quently the Sheriffe upon the *fieri facias*, for a Creditor, who hath recovered against the Executor to pay debt owing by the Testator, cannot hold.



CHAP. VIII.

*Of some cases and questions between the Executor and Heire.*

**T**HE Executor may in convenient time after the Testators death, enter into the house descended to the Heire, for the removing and taking away of the Goods, so as the doore be open; or at least the key be in the doore: and this I understand of the doore of each roome: for although the doore of entrance into Hall and Parlor be open, the Executor cannot by that justify the breaking open of the doore of any Chamber to take goods there, but

*21. Hen. 6. 30.*  
If other goods taken among them, he is excused, *21. H. 7. 25.*  
*Vide lib. Intr. 640.* It is so pleaded.

43. E. 3. 24. Bro.  
145. Makes a  
qua. if it be  
locked.

Flow.com. 280.

43. Ed. 3. 2.  
10. Ed. 4, 5, 6.  
Of the deed  
Execution first.

12. H. 4.

but only may take those in the room  
which be open ; and this is proved  
to me it seems by the case of the chest  
with evidences, which, saith the Book  
the Executor may take and put on  
the Deeds, delivering them to the  
Heire, viz. the chest being unlocked  
as I understand it. Now a Chamber  
or other room within a house, locked  
is an enclosure of better respect than  
chest. But if the goods be not remo-  
ved within convenient time, the  
heire may distraine them as *damna-  
fesante*.

Where the Testator recovered  
Land and dammages, or a Deed and  
dammages, he dying before execu-  
tion, the Heire shall have execution  
for the Land or Deed, and the Execu-  
tor for the dammages, but *temp. Edw.*  
the 4. it is said that untill the Heire  
sue a *Scir. fac.* the Executor cannot  
sue execution for the dammages.

If a Creditor be made Executor by  
his Debtor, and pay himselfe part out  
of the Goods, he cannot sue the Heire  
for the rest, because the debt cannot  
be apportioned, but otherwise, he  
may, saith the Book : yet *Qua.* if he  
doc

he take upon him the Executor-  
ship, and have goods sufficient to  
pay all.

If a debt be recovered against one  
who dieth before execution sued, leav-  
ing goods sufficient to satisfie;  
yet shall not the Land descended to  
the Heire, be charged therewith, nor  
for like reason, any land conveyed af-  
ter Judgement.

7.H.4.f.31.  
See Bro. Exe.  
124.

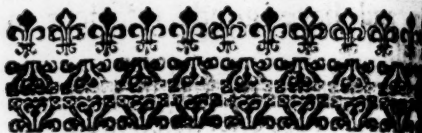
See a good difference where land  
conveyed, upon condition of pay-  
ment to the Vendor his Heires or as-  
signes, and he dyeth before the time,  
and where it is to be paid to the Ven-  
dor his Heires or Assignes, and hee  
dyeth; in the first case, payment shall  
be to the Executors, but not in the  
other.

Co.l.3.f.90.91.  
To the like  
purpose see  
more, Litt.  
f.77.b.  
2. Eliz. Dy.  
281. Plow.  
com.291.

What things pertain to the Heire,  
and what to the Executor, is before  
reviewed. As for *Frowicks* opinion,  
that where goods be mortgaged upon  
condition, that if the Heire or Exe-  
cutor pay, &c. Here if the Heire  
make payment, he should have the  
goods: I see not how that can

21.Hen.7.4.

A Di-



A Directory for the following  
Chapter.

---

- A. *All as but one represent the Testators person, and must joine, and joyned in suite, & è contra.*
- B. *Where one alone must answer for and how.*
- C. *When they differ in Plea, the shall be taken, but one may confesse alone.*
- D. *One as well as all, hath, may assent or release the whole.*
- E. *One cannot give nor release to another, nor divide.*
- F. *The possession of one is the possession of all, to what purpose.*
- G. *If the survivor die Intestate, the Testator is intestate, though there be other Executor left an Executor.*

- H. *Included in the person of the Testator, and represents it. Is his Assignee; all one, & è contra.*
- I. *What change by death of the Testator, touching proceeding in suite.*
- K. *Proceed to or in Execution, where without Scire fac.*
- M. *Whether the Executor stand in his owne quality, or his Testators.*
- N. *Where one alone may sue.*
- O. *In suite for them such as will not joyne, shall be severed, and the other may sue and prosecute alone; consequents inde.*
- P. *Death of one Executor, Plaintiff or Defendant; where abates Writ.*
-





## C H A P. IX.

*How Executors stand betweene themselves, and in representation of, relation to the Testator, as his Assignee or Deputy, or as the same person with him, and where and what purpose, as other persons,*

**A**  
Are as one person; therefore cannot plead several pleas in abatement. 37.

*H.6.17.9.H.6. f.44. 38.E.3.9 Bro. ex. 13.*

*Bro. ex. 20.21.*

Therefore one Executor sued, if he plead that there is another Executor not sued, must plead that he did administer  
*9.H.6. 44. Bro. 13.33. H.6.38. Bro.20.*



First, all of them do represent the person of the Testator, and therefore must be all joyned in suite against others, and in suite by others they must be made Defendants, or at least so many of them as doe administer: for though the Executors themselves must take notice by the Will, how many Executors be, and must frame their suite accordingly; Creditors and strangers need not take notice of any more than doe administer, and Executors

the office of Executors. For this reason, as I take it, in the time of King Edward the 3. where two Executors were of a terme, and the rever- <sup>32.E.3. quid</sup> <sup>jur.clam.5.</sup>

sion was granted by Fine, mentioning but one termor, and thereupon a *Quid juris clamat*, accordingly brought against that one Executor, this was held good enough, though the other Executor was not named in the Suite; belike, because that one (who indeed was the Testators Wife) did only occupy the Land, and take the profits thereof; for else since all the Executors doe represent the Testators person, all must have been named.

Therefore did the Judges resolve in the time of Henry the 4. that <sup>13.H.4.Aid.</sup> <sup>186.</sup>

where a Lessee for yeeres made two Executors, and one of them was distrained by the Lord for Rent, who vowed upon the Lessor, that Executor should have aide of his fellow Executor, to the end that both might have aide of the Lessor, which one alone could not. And upon this reason, viz. that the Executors represent the person of their Testator, as one person (for so speaks the Parlia-

<sup>9.E.3.cap.3.</sup>

ment ) It was enacted in time of Edward the Third, That the Executors though never so many, shall have but one essoyne, neither before appearance nor after, because their Testator whose person they represent, could have had no more.



**B**  
But not if he  
appeare at the  
summons. 1 E. 4.

1. 14. H. 4. f. 11.  
But the Plain-  
tiffe must de-  
clare against  
all. He need

not, but he may  
admit another  
to appeare, and  
plead after.

7. H. 4. 12.

But Proceffe  
must be con-  
tinued against  
all.

7. H. 6. 35.

Executors of  
Executors by  
equity. 39. H. 6.

45. Bro. Exec.

99.

It is further also enacted by the said Statute, that where two or three Executors or more be, they being sued in an action of debt, though all do not appeare; yet such one of them as more as doe, or doth appeare at the *Grande distresse*, shall answer alone without his companions. And this Statute hath been taken by equity in three respects.

First, touching the persons: that it shall extend, not to Executors only, but also to Executors of Executors, yea to Administrators also, though the Statute speak only of Executors.

Secondly, touching the Actions: whereas the Statute speaks onely of the Action of debt, it is taken by equity to extend to other actions, as the Writ *de rationabili parte honorum, detinue*, yet perhaps, this latter action will be said not to be maintainable against

against

against Executors, for their Testators  
 aft, but for their owne onely; But  
 we yet are not come so farre as to de-  
 termine what is maintainable; but  
 whether before all the Executors doe  
 appeare, hee or they which have ap-  
 peared, shall be put to answer; and  
 so to bring it to *decision*; whether the  
 action be maintainable, or not. I  
 thinke also, that in the action of cove-  
 nant, and all other actions against Ex-  
 ecutors, as Executors; hee which  
 appeareth, must answer without his  
 companions, though the greater opi-  
 nion in the *Quadragesimes* were con-  
 trary touching the actiō of Covenant.  
 But as for the *sub pena* against Exec<sup>rs</sup>,  
 which is to make them to answer to a  
 suite in equitie; that hath been *temp. E.*  
 taken to be out of the reach and in-  
 tent of the Statute. So also of the *La-*  
*rit* in the Kings bench, as was held  
 in the same Kings time, except all the  
 Executors, making up the whole re-  
 presentative body of the Testator, be  
 in the custody of the Marshall, one or  
 more of them who are there, shall  
 not be inforced to answer; and so was  
 also lately held in the Kings Bench,

28. H. 6. f. 4.

14. H. 4. 23, 24.

So negatively,

21. H. 6. f. 1.

28. H. 6. f. 4.

3. H. 6. 351.

39. E. 3. 5.

There it is not  
merely as Ex-  
ecutors, it is out  
of the stat.

11. H. 4. 63. As

if in *deb. & det.*

B

Cont. 47. E. 3.

22.

So. 7. E. 4. 20,

21.

3. H. 4. 20. In-

*sci fac.* upon a  
pardon by de-  
fendant out-  
lawed at their  
suite.

47. E. 3. 21.

Only *Fencld.*  
in the Affir-  
mative.

8. H. 4. 5.

9. E. 4. 12, 13.

B

20. vel. 21. *Jas.**regis.*

where Master Justice *Houghton* gave an excellent reason; This case is out of the said Statute, viz. for that this Writ doth not mention any debt, nor name the Defendants Executors.

Thirdly, and lastly, that Statute is extended by equity to other Writs or Processe; for where the Statute speaks onely of the Grand distresse, and the Executors appearing thereupon; It hath been many times ruled, that when he or they appear upon the Attachment, *Capias*, or *Exigent*, answer must be, though the rest appear not; for so the word *Distresse* is taken for all compulsary meanes or enforcement of appearance. But where the Statute reacheth not, viz. when the Processe is determined against one or more, as by Outlawry, &c. there the rest must answer by the rules of the common Law; except it be in the case of Husband and Wife Executor, for there the Wife cannot answer without her Husband, nor doubtlesse can he without her; where she & not he is Executor; but where both be Executors, there he may answer without her, but not she without him. When Execu-

I.E.4.1.  
40.E.3.1.

II.H.463.  
Or if but one  
appeare, 28. H.  
6.f.364. judge-  
ment against  
a l.

as Defendants have appeared, if any one of them will confesse the action, this bindes and concludes the rest; but if one will plead one plea, and the other another, that say some, shall be received which is best for the Testators state; so where they sue, such as will not prosecute, shall be severed, and the rest without them may proceed; and in like manner where they pray to be received to defend their term, and one of them after makes default; it shall not be the default of all, but the rest; or he, if it be but one who appears, shall be received to uphold the defence of the term.

Thirdly, so where they plead a release to the Testator or themselves, one after making default, this shall not be, nor make a totall default in the Executors, to induce a judgement or condemnation against them. Yet in truth each Executor hath the whole of the Testators Goods and Chattels, be they Reall or Personall, and each may sell or give the whole. One of them cannot give nor release to the other his Interest, and if he do, it is void, and he who releaseth shall still have a

Sec 9. E. 4. 12, 13, 14. where B. who is not Executor is joyntly sued with A. and B. confesseth, 21. H. 7. 25. Yet 7. E. 4. 8. They may sever in pleas not dilatory. C

7. H. 6. f. 6. per Cotesmore.

If they recover & one of them prayes a *cap. ad sat.* and the other a *fieri. fac.* the first as best shall be granted

3. H. 4. 10. Bro. 44. So where the defendant Outlawed at the suit of two Executors, and upon the *Sci. fac.* after his pardon but one appears, as 1. H. 7. 25. D

9. E. 4. 12. 4. 21. E. 3. 13. 27. H. 8. 21, 22.

much interest, as he to whom he released, because each had the whole before, upon this reason long since where one of the two Executors released but his part of a debt, it is held that the whole was discharged: and so if one Executor grant his part of the Testators Goods, all passeth, and nothing is left to the other, for each hath the whole, and there be no parts or moyeties between Executors. Therefore, also though a lease for a thousand yeares, of a thousand acres of Land come to two Executors or more, no partition or division can be made between them, because it is not between them, as between joint Lessees of land where each hath, but a moyety in Interest, though possession of or through the whole. Amidst Executors, each hath the whole, and therefore if he grant his part he grants the whole. But one Executor may demise or grant the moiety of the Land for the whole term, and so may the other doe, and this way they may settle in friends or others trusted for them, a moyety for each, either in severall or undivided; but

If an horse  
come to foure  
Executors, each  
hath an horse,  
& yet all foure  
have but one.  
27.H.8.21,22.

E

D

one of them cannot make a lease to the other of any part, for he had the whole, nor can one sue the other as executor, yet if the Testator devise to one of his Executors, all his goods, *6.H.7.5.* after such debts and Legacies satisfied, there, after those satisfied, that Executor may take the goods, and maintain an action of Trespasse against the other Executor, if he take them from him, and consequently an action of *Detinue*, for keeping or detaining them: but this is as Legatee, his own assent perfecting the Legacy.

The possession of one Executor, is the possession of all the rest; so, as if one appearing to a Suit, and the other making default, in whose hands all the goods be, which are not administered, if, I say, here he that appears, *14.H.4.12. Bro. 12.* leads that he hath nothing in his hands, this shall be found against him; for whatsoever any of the co-executors hath, he also hath, and is in possession, and so shall the Creditor recover, and have judgement to be satisfied out of the testators goods, as in his hands. And therefore if *All must sue. 19.H.6.65.cont.* goods be taken from one, all may maintain



24.E.3.40, and  
42.E.3.26. It  
may be in his  
name only  
from whom  
taken; nor  
need he be  
named Execu-  
tor, *Br. Ex. 31.*

39.H.6.45.

F  
G

32.H.8.Bro.ex.

149.

39.H.6.45.

*Co. lib. 5. f. 97.*

H

*Chapman & Dal-  
tons case, Plow.*

maintain an action of Trespasse there  
upon; for the possession of one is the  
possession of all. But the possession  
of one shall not be so the possession  
of all, as to charge the others on  
goods: whereof more elsewhere.

Where two Executors be made  
the one making a Will and executor  
and dying; if the other dy after in  
state; now shall not the Executor  
him who first died be Executor to the  
first Testator, but he is dead intestate  
because the surviving Executor is  
dead; and in him the Executorship  
was wholly and soly settled by the  
death of his fellow before him: So  
Administration, *de bonis non administratis*  
shall be committed.

The Executors, or Executor, if but  
one so represents the person of his Testa-  
tor, that he is in Law his Assignee  
by the very making of him Executor  
so as if one covenant to make a Lease  
to *I. S.* and his Assignes by such a time  
and *I. S.* dyeth before that time, and  
before the Lease made; now may  
the Lease be made to his Executor  
as his Assignee, representing his person;  
so also in a condition to pay

the Feoffor or his Assignee, yet a  
 case to *A.* and his Assignes during  
 life of *B.* shall not goe to the Exe-  
 cutors of *A.* So where in a generall  
 pardon by Parliament, there is an ex-  
 ception of persons outlawed after  
 judgement, unto the person so out-  
 lawed, shall satisfie the Creditor, who  
 hath Outlawed him. If the Outlaw  
 dies before this done, his Executor as  
 presenting his person, may make  
 satisfaction, and so make the benefit  
 of the pardon to extend to his Testa-  
 ment, for saving his goods, as if himself  
 had satisfied his Creditor, though he  
 left them unsatisfied, when he left the  
 world, & *diem obiit testremum*. Yet  
 where *A.* sold Land to *B.* upon provi-  
 sion that if he payed to *B.* his Heires, or  
 Assignes, &c. *B.* dyed. *A.* payed at the  
 request to his Executor, and it was doub-  
 ted that it was not good, for the word  
 Assignee could not reach to him be-  
 cause no Assignee of the Land: and where  
 the Executor brought an action of ac-  
 count upon a receipt by the hands of the  
 Feoffor; the Defendant could not be  
 admitted to wage his Law; for that  
 it was held a receipt, *per antermains*;  
 yet

Sir Edward  
*Pbittons case,*  
*Co.lib.5.f.80.*

A

So where the  
 stat. of *W.I.*  
 gives time for  
 proofe to him  
 whose goods  
 were wrested.  
 His Executors  
 may do it, if he  
 dye before the  
 time, *Co. li.5.*  
*107. b.*  
*Co.lib.6.f.80.*

Also Executors  
 shall have resti-  
 tution of stoln  
 goods, and a  
 Writ of Error;  
 yet the Statute  
 speaks but of  
 the party.

H

2 *El.Dy.* 180.  
*Contr.* where to  
 pay to *A.* the  
 Feoffor his  
 heire or assign.  
*Co.lib.5.f.97.*  
 2 *El.Dy.* 183.

3. Eliz. Dy. 201.

H  
27. H. 8. 26.

M. 15, & 26.  
Eliz.

I  
34. Eliz. vel  
circiter Titherley  
& Loxor.  
Walsh. in ba. reg.

I  
36. H. 8. Bro.  
stat. Merchant.  
43.

K  
2 R. 3. 8.

yet it is cleare, that if one by Bond  
Covenant tye himself to pay such  
summe at such a day, not mentioning  
his Executor at all; yet is the Execu-  
tor bound, as included in the name of  
person of the Testator. And where  
the Statute 23. of Henry the Eighth  
gives the Writ of attain (in the cases  
there mentioned) against the person  
that had judgement, it lieth against  
his Executors if he be dead; where  
thereof another reason is given.  
Where a man was bound, that he  
would not sue upon such a Bond, after  
he dyed, and his Executor sued; the  
Bond was held to be no forfeiture of  
Bond. So where one was bound to  
pay ten pound within a moneth after  
request made to him, and hee died  
before request; it sufficed not to make  
it to the Executor, as *Manwood* says.  
It was likewise held that the warrant  
of Attorney put in for the Plaintiff  
in debt, sufficeth not for his Executor  
to bring a *Scire Fac.* upon the judg-  
ment. And if Executors sue Execu-  
tion upon a Statute in the name of  
Conusee, as if he were alive, this is  
void, and they may sue out new execu-  
tion.

and this they may doe without  
*Scire facias*, as well as the Conu-  
 migh, if he had been alive. But  
*Hussey* Justice, if the Conusor in a  
 tute staple be returned dead by  
 the Sheriffe upon the Extent; a *Scire*  
 must be sued out before extent  
 proceed; and upon a judgement had,  
 the recoverer die before execution,  
 Executor cannot, as himself might,  
 out execution without a *Sci. fac.*  
 as there said. Yet if after a *Capias*  
*fat.* awarded, the Plaintiffe die  
 fore it be executed, the Sheriffe  
 y proceed to the taking of the par-  
 and is not subject to any action of  
 imprisonment, nay, if he suffer  
 to escape, he is chargeable, as  
*Elizabeth*, it was resolved upon  
 motion of *Anderson*; but withall  
 was held, that reliefe might be by  
*querela*. Like resolution was  
 the Kings Bench, After some doubt  
*Wray*, and the other Judges, where  
 Defendant died after a *Fieri fac.*  
 ended, and before it was execu-  
 that the Sheriffe might proceed  
 on the Goods in the hands of the  
 Executors.

H I  
 15.H. 14.

F

15.E. 3. Resp.

1. cont. upon  
 a Stat. Mer-  
 chant.

K

Cente Na. n. br.  
 267. upon a re-  
 cogniz.

I

H

30. Eliz. rot. 31.  
 in ba. reg.

But

I

But if the Defendant in an action debt upon a bond, plead a tender the time and place of payment, and renders the money in Court, where rests, and then he dies, now shall the Plaintiffe, have this money, because the property thereof is changed, and become the Executors, was held in the Common pleas, he is put to a new suite against the executor. Yet where judgement once given in a Writ of Partition, a termor, or in a Writ of Account, the Plaintiffe die before the second judgement, needfull in both cases, the Executor is not put to a new suit, but may proceed by *Sci. Fac.* upon the former judgement, as the Lord *Anderson* held upon the motion of *Fenner* Serjeant. Though before found the Executor not in points of law, all one with the Testator, yet in points beneficiall, the Testator includes him in some cases, as when an Abbot granted to his Lessee to have Estovers in another ground, it was held that his Executor, though named, should enjoy this, during the terme, as well as himself should have done.

P

32. Eliz. vel  
circit.

I

Plas. 28. Eliz.

H

done. And whereas the Stat. 23. of H. the 8. gives costs to a Defendant against a Plaintiff, suing for a wrong, or breach of promise, or the like, done to the Plaintiff against whom it shall be by verdict or nonsuit; it hath been resolved that an Executor suing upon such wrong or breach of contract to his Testator made, should not pay costs, because he is another person than the Testator; and so is it usually in experience. But if in such suite, the Attorney of the Executor misbehave himself towards him, and for this the Executor sueth him, here if it shall be against him in manner as afore-  
said, he shall pay costs, because this is a suite for a wrong done to him-  
self.

*Trin. 36. Eliz.  
in ba. reg.  
H M*

*Pa 41. Eliz. in  
com. ba.*

If *A.* recover a debt as Executor of *S.* and makes *B.* his Executor, and before execution sued, *B.* is not to new suite, but may have execution upon that Judgement: But if *A.* died intestate, now could none Administrator to either of them, or as Administrator of *I. S.* have execution of this Judgement; for the former hath no interest in any thing per-  
tain-

**I**

**H**

28. H. 8.

rayning to *I. S.* and the latter com-  
meth to title above the judgement  
*viz.* as immediate administrator  
*I. S.* who is now dead intestate :  
derives no title from the Executor  
who recovered.

2. El. Dy. 180.

I

If a Conusee have a certificate in  
the Chancery, upon a Statute, and the  
dyes, before extent taken out, his Ex-  
ecutor is put to a new Certificate,  
for obtaining of it, must make Affi-  
vit, that no extent hath yet been tak-  
out.

M

If an Alien join with his Wife, who  
is Executor in a suit for debt, and  
commeth to Issue, he shall not have  
triall *per medietatē alienig.* or *Lingua*  
should be if he otherwise were party  
to a tryall, as was held in the case  
*D. Julio.* Yet if a noble man sue as Ex-  
ecutor to another, not noble, he shall  
for his nonsuit be amerced 5. pound  
if he sued in his own right, as was com-  
ceived 21. E. 4. 77. By the same reason  
and reason doubtlesse a Noble-man  
sued as Executor, shall not be arrested  
nor shall any *Capias* be awarded  
gainst him for not appearing. And  
any tryall shall be of any issue, the

shall be two Knights of the Jury, as in  
other cases where a Peere is party.  
likewise where the Wife is to have  
her convenient apparell, whereof the  
Executor must not bereave her; If  
she be a noble woman, it shall be an-  
swerable to her degree.

If one Executor only sell goods of  
the Testator, he alone may maintaine  
an Action of debt for mony. So if  
goods be taken out of the possession  
of one Executor, he alone may main-  
taine an action, and that without na-  
ming himselve Executor.

Some touch hath been before of  
summons, and severance, whereabout  
this added. If one Executor will  
not, or cannot joyn in suit with the  
other; so as he is summoned and seve-  
red, now by his death, after the suit  
not abated, 16. Ed. 2. Fitzb. 151.  
if he live till judgement, he may  
have execution, say other books, 13. Ed.  
Fitzb. Exec. 9. 11. R. 2. Priviledge 2.  
Que. of that for he cannot ac-  
knowledge satisfaction, as hath been  
before resolved Mich. 14. & 15. Eliz.  
319. And the reason thereof be-  
cause he is no party to the judg-

L ment

A

38.E.3.f.9.

N

O 3.H.7.1.&amp;c

5.E.2.Fitzbr.

802. Conte,

38.E 313, &amp;

20.E.3.tit.ac-

count, 78.



ment, by the same reason can he not sue execution upon it, for how can he have execution for whom there is no judgement given, now the recovery is only in the name of the other Executor, yea, by the said last book, it seems that after judgement had, he cannot release the debt, because it is now altered in nature, and turned into *rem judicatam*, though at any time before judgement he might have released it as both that last book saith and the two precedent *temp. Ed. 3. Rich. 2.* yea in an action of account, after judgement had, that the Defendant shall account, the release of him severed, is a good discharge to the Defendant, as was resolved 48. E. 3. 14, 15, but this is not a plenary judgement, for nothing is recovered thereby but another judgement is to be had after the account, which may be against the Plaintiff, so as this release cannot be before any debt or duty adjudged. What if the Defendant be had in execution at the suit of the Executor, who prosecutes it, and escapeth, whether may the severed Executor discharge the Sheriffe or Jaylor by a Release, I think he may not.

By that above it is plain, that if any one of the Executors Plaintiffes dye, the Writ is abated, only where he so dying was before severed; opinions have been different, as above appears. 2.H.4.f.14.  
So also is it, if one of the Defendants Executors dye. Yea, if the Plaintiffe Creditor sue A.B.& C. as Executors, where only A. and B. are Executors, where by the death of C. the Writ abates, or falls to the ground, yet A. and B. as I think might have pleaded abatement, that they onely were Executors, traversing that C. was not executor, but the Book doth not so solve. See 46.E.3.f.9,10.

As A. and B. above might admit that Writ against them and C. So if the Writ or suit had been against A. only, and he so admit it not pleading abatement, the recovery against him alone is good; 9.E.4.12.

One that is Outlawed or attainted in his own person, may yet sue as Executor, because this suit is in anothers, viz. the Testators: But he that is excommunicate cannot proceed in it as Executor, because none can converse with him without being ex-

21H.6.30.

M

21E.4.49.69.

42E.3.13.

14.H.6.14,15.

3 H.6.40. Iittl.  
44. Co. lib. 81. 69  
11. R. 2. excom.  
25.

communicate, as a Book sayes. Yet doth not this excommunication pleaded, abate or overthrow the suit, but make that the Defendant may stay from answering his suit, untill the Plantiffe be absolved and discharged from his excommunication.



## CHAP. X.

### Of the Possession of Executors, or their actual Having.

1. *What shall be said, so to come to their hands as to charge them.*
2. *What shall be such a getting, or getting from them, as to excuse them.*



WE have before considered what things shall come to Executors, and being come shall be Affected in their hands. Now for that it is said in *Reedes Case*, that

an Executor shall not be charged with, or in respect of any other goods than those which come to his hands after his taking upon him the charge *Co-lib. 5.* of the Executorship. Let us now examine what shall be said, and accounted such a full and compleate coming to the hands of Executors, and shall make them within the reach of charge of Creditors, and Legatees *viz.* For the payment of debts and Legacies. As touching debts due to the Testator, it hath before been shewed that untill Judgement and execution had; they be not Assets in the Executors hands. Now then, as touching other goods or chattels possessory, which are of two kinds, *viz.* reall, and personall: Let us put the Case thus. The Testator at the time of his death hath a flock of sheep in *Comberland*, Corn in the Barns in *Cornwal*, Bullcoks in *Wales*; fat Oxen in *Buck. shire*; Mony, Household-stuffe and Plate in *London*; Lease for years in *Norfolke*, and his Executor dwelt at *Coventry*, *viz.* farre from all these places: what kinde of possession shall the Law judge this Executor to have in every of these, in

Perk. 6. 1.

45 E. 3. 17.  
21 H. 6. 43.

stantly upon the Testators death, and before he come where any of the things be, either to see or seize upon them? In all the particulars above mentioned the Law is all one, except Case of the Lease for years, which if it be of Land (as is most usuall) then because it is a settled and immoveable thing; the Law doth not reach to the foot of the Executor, to put him in actuall possession, for (*Passessio quasi pedis positio*) untill himselfe, or some for him actually enter thereupon. Nor indeed need the Law help or supply the want of actuall possession in this Case, as in the case of moveables; since Land cannot be carried away as goods may, and therefore is not subject to purloyning or imbecilement as moveables are. But if the Lease for years, were of Tithes, the Executor, though in never so remote place from them, shall be instantly upon the setting out thereof in actuall possession of them, so as he may maintain an action of Trespasse against any stranger which shall take the Tythes set out, though he, nor any for him did ever before possess

any of the said Tythes, or came neer unto them. But if the case were of a Lease for years of a Rectory consisting not onely of Tythes, but also of Gleabe Lands, into which entry may be made, as also Livery of seison in it, when it may perhaps be some question, whether such an actuall possession in Tythes, shall be given by the Law to an Executor, neglecting to enter or not entring into the Gleabe Land. And so I leave the consideration of Chattels reall,

Touching things Personall, in which the Executor hath such an actuall possession, presently upon the Testators death, as that he may maintain an action of Trespasse against any stranger taking them away or spoyling them, though he nor any for him ever came neer them: whether yet this shall be such a possession in the Executors, and such a conning of these Goods to their hands, as to charge them with payment of debts and Legacies, yea to make their own Goods lyable in stead of these, is a point worthy of consideration.

And doubtlesse, this thoroughly  
L 4                      fisted,

9 E.4. 30.  
Plow. com. 281.  
32 H.6. 13.  
14. H.8. 22.

sifted, will prove a case mischievous  
 whether way soever the Law be ta-  
 ken, for first it must be admitted  
 that without the Executors laying  
 his hands actually and particularly  
 upon the Goods in the house or field  
 of the Testator, whether the Executors  
 hath resorted, hee shall be said to be  
 possession, as to stand lyable unto  
 the Creditors, so farre as they extend  
 in value, though after, others pur-  
 loyne or imbecill them. Now then  
 if distance of place shall make diffe-  
 rence, where shall be the bound and  
 limite of that distance, and if the Ex-  
 ecutor may come at a strangers  
 king or possessing of the goods, it is  
 mischievous to Creditors.

On the other side, if it shall be laid  
 upon the Executors to answer for  
 the Goods whereof the Testator dyed  
 possessed, it will be mischievous for  
 them and deterre them from taking  
 Executorship upon them, since much  
 purloynning, may be even of money  
 Jewells, and Goods by Servants and  
 others, about the Testator, or where  
 these things be. I thinke therefore  
 that if without any fraud, collusion,

voluntary conniving on the part  
of the Executors, they be prevented  
by others, of laying hold on the Testa-  
tors Goods, so as that they may di-  
pose of them; especially, if it cannot  
be knowne by whom they are so pu r-  
chased, and imbefilled, or if they  
be persons fled, or insolent, that then  
they shall not stand upon their score,  
as goods come to their hands, in re-  
spect whereof, Creditors or Legatees  
shall draw so much from them, even  
out of their owne Goods. as in other  
cases where they have, no such excuse  
shall be.

And of this minde I the rather am, 33. H. 6. cap. 1.  
because I finde the whole Realme in  
Parliament, taking notice of such pre-  
vention of Executors, comming to  
the goods of their Testator, by the  
wrongfull act and imbefilment of o-  
thers, without any default in them-  
selves. And in this Case the Parlia-  
ment hath given speciall remedy, viz.  
that Writs shall be directed to She-  
riffs, to make open Proclamation for  
the appearance of the parties delin-  
quent in the Kings Bench, at the day  
limited, and in default thereof they  
shall



shall be attainted there of felony, the Writ being returned executed, viz. Proclamation made. But note that this Proclamation is to be made two Market dayes, within twelve daies next after the Delivery of the Writ, and the last Proclamation must be made fifteene dayes before the day of appearance. And these Proclamations must be made in such Cities, Burrowes, Places (saith the Statute) not expressing what is meant by the word such, and therefore, meaning doubtlesse those in which the act or offence is committed. So that if the fact is not committed within the limits of some Citty, Burrow, or Market Towne, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market dayes, in the place where, &c. Now besides other Places, even some Burrowes, viz. Townes, sending Burgeffes to the Parliament, have no Markets, and there are no Places within the Act. All which two Executors must require the Writ, therefore where there is but one Executor, no reliefe is given by this Law, for it is penall, making

the felony, and therefore shall not be extended by equity beyond the Words. Lastly, it extends but to the Executors of Lords and Persons of good degree, and onely to the trespassing servants of such Persons, not to other strangers, purloyning the Goods. But now, who shall be said to be Persons of good degree, not being Lords, I will not much labour to decide, the rather because I have not heard, nor read, to my remembrance, of any Action brought upon this Statute, but I thinke that good degree must stay either at a knight, being the lowest dignity, or at a Gentleman, being a degree of the Worship, as elsewhere is shewed, and not stoope any lower.

And the said Statute seems in some sort to imply an opinion this way, which I incline, in that it expresth this purloyning to be an impediment to the execution of the Will, whereof if the Executors shall answer and make good to Creditors & Legatees, of their owne state and Goods, or these imbefilled, the execution of the Will is not hindered, but the  
Exe-

Executors are damnified in their own private valew, yet it may be said on the other side, that some things given in *specie* by the Will, such a peece of Plate, such a Furniture of a bed Chamber, such a Jewell may be purloyned, so that the Legatees can never have them, and consequently the execution of the Will be hindered though some recompence be made by the Executors, but how these Legatees shall recover recompence in such cases; for that Legacies are not to be recovered by Suite at the Common Law, I must leave to the Professors of the Common or Civill Law to inform. But if the Executor be of secret consent to this imbesilment, where even the forbearance to sue for the recovery of the things, or the value of them in dammages, if knowne whether they, or the imbesillers be, is a shrewd evidence or prooffe, Then shall the Executor be adjudged an haver of them, and so stand charged as having them, for *Pro possessore habetur quod dolo desit possidere.* And if in any Case the taker by prevention from the Executor before his knowledge

perhaps, of the Testators death, or  
least, before his possibilitie of re-  
turne to the place, where the goods  
were, to put them in sure custody; if  
say, such actor keepe these goods  
from falling upon the shoulders of the  
executor, they shall surely fall upon  
himself, and make him chargeable at  
the Creditors suite, as an Executor  
of his owne wrong.

*Of Goods lost by, or gotten from,  
Executors.*

But put we the case (for thereun-  
to shall be our next step) that  
goods come fully into the Executors  
possession and hands, but be againe  
lost or gotten from them without  
any default in them; Shall they yet  
be answerable out of their owne  
estates for them? Surely hereabout  
no distinctions must be made as I  
take it.

The first whereof I derive from our  
law touching escapes of persons  
taken in Execution, and imprisoned,  
which be rescued by Alien enemies,  
The Sheriffe or Gaoler shall not an-  
swer out of his own goods for his debt;  
other-

33.H.6.1.

16.E.4.2.3.

7.Eliz.Dy.241.

otherwise if it be done by Subjects, against whom remedy is to be had by the course of Justice : and so should thinke it to be touching Executors, viz. that if enemies landing ( as near the Sea Coast may easily, and often happen ) shall take away Cattell, or Goods from an Executor, hereby he shall be excused, contrariwise ordinarily, if the ereption or direption, be by subjects knowne and actionable. Another difference I shall think may probably be taken from the rules of our learning touching Bailement. If *A.* deliver Goods to *B.* to keep as his own, or generally, viz. without any speciall undertaking by *B.* to keep them safely, and without any money or other valuable consideration, given for the safe custody ; Here if *B.* be robbed of them, he shall not make satisfaction to *A.* for them ; and so if they be stoln from a Servant, or Factor. But if they be taken away by a known Trespasser, not feloniously, some opinion hath been, that the Keeper shall make recompence, because he had remedy for recompence, or satisfaction from the Trespasser, yet of this last

*Vid.* 29. *Aff.* p.  
28.8. *Ed.* 3. *Fitz*  
*detin* 59.9 *Ed.*  
4.90.  
3 *H.* 7.4.  
*Co.* l. 4. f. 83, 84.

I should doubt, because *A.* himself  
 as well as *B.* may have this Action for  
 damages against the Trespasser.  
 Now an Executor is of the nature of  
 each one having the custody of ano-  
 thers Goods, and I have seen in  
 manuscript entire, the Writ of Tres-  
 pass by the executor, expressing  
 Goods of the Testator in the Custody  
 of the executor to be taken from him;  
 therefore me thinks he should no o-  
 therwise be charged then *B.* to whom  
 Goods were, as above is said, delivered  
 to be kept. For the Executor haply  
 shall have no benefit nor advantage by  
 the Executorship, all the Goods not  
 sufficing perhaps to pay debts, and  
 legacies, which is the state we most  
 think of, viz. where Goods want to  
 pay debts, and Legacies, for where  
 there wants not, the question need not  
 be made. Yet a Servant or Factor,  
 who hath wages for his service, is not  
 thereby made lyable to satisfy for  
 things in his custody stoln, because he  
 is not for this particular custody,  
 any compensation so of an Executor,  
 perhaps benefit might accrue to him  
 by the Executorship, as haply the  
 discharge

discharge of a debt owing by himself  
 &c: Other Cases there be, wherein  
 the Executor will stand more clearly  
 discharged. As if the Testator left  
 Lease for years, state by extent, ware-  
 ship, or other Goods whereto he had  
 but a defensible title, and they be evid-  
 ed after his death. So if he left a ship  
 at Sea with much Goods and Mer-  
 chandises, which are drowned in  
 the return, never arriving in safety.  
 So also if he left a flock of sheep  
 tainted with the rot, which dye shortly  
 after him, in none of these three ca-  
 ses doubtlesse shall the losse fall upon  
 the Executor. But to put a Case of  
 more doubt, what if a Lease for years  
 come to an Executor, subject to  
 Condition for payment of Rent, or  
 summe in grosse, and the Executor  
 failes in payment, whether shall the  
 losse fall upon the executor, to be  
 made good to Creditors, or Legates  
 out of his own substance, or not? To  
 this I must answer by this distinction  
*viz.* If the executor had taken the  
 profits of this Land so long as to furn-  
 ish him with mony for this payment  
 or if he had other Goods of his Testator

ors in his hands to supply the pay-  
ment, then is it his default that the  
money is not payed, and he must beare  
the smart thereof: otherwise not, for  
he is not bound to make payment out  
of his owne Goods, yet is he a fullen  
and unkinde Executor who will not  
doe, when as he may repay and sa-  
tisfie himself by the profits thereof  
after. Like Law if the Executor suf-  
fer a bond of a hundred pound to be  
forfeir, for not paying of fifty pound,  
having sufficient in his hands. So al-  
so of a Recognizance, Statute, or  
Judgement, defeazanted upon pay-  
ment of a lesse Summe; yea, I lesse  
doubt of all these Cases, then of the  
forfeiture of the lease for yeers; for  
surely the Executor had time to have  
sold the Lease, and made money there-  
of, towards the payment of Debts, the  
omission and neglect whereof may be  
imputed unto him as a default justly  
occasioning recompence to be by the  
Law required from him. But per-  
haps he may excuse himself that he  
could not finde a Chapman who  
would give him to the value thereof:  
unto yet reason can easily reply,

Yet *Quere.*

M

that



that it had beene much better to have sold it under the value, then to have lost the whole value, by exposing or abandoning it to a totall forfeiture.



## CHAP. XI.

*How farre, and where an Executor having Assets, is chargeable or liable to Action.*



HAVING considered what things shal come to Executors, and what Assets in their hands for the performance of the Will. Let us now consider what thing the Executor is bound to pay, satisfie, or performe, and what not, where he is chargeable and where not, this being admitted that hee hath Assets, viz. sufficient wherewith to performe.

Here wee will confider of  
these parts.

1. *Of Debts by Specialty or Record.*
2. *Debts or duties by Contract without Specialty.*
3. *Debts without either Contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

Touching Debts by Specialty,  
which are the most usuall and  
common obligements, it will not be  
impertinent to give a little light  
touching the validity of a Specialty,  
and the extent of it to Executors.  
The most doubt will arise upon Bills,  
and such writings, Obligatory, made  
by Scriveners, nor Clarkes, in  
common forme, but by others, other-  
wise for haste, or through simplici-  
ty. Thus long since wee finde a  
writing made by *A. to B. Memorand. 22. E. 4. 12.*  
I have received of *B.* ten pound,  
M 2 which

19.R.2.F.Dot.  
166.

9.H.6,7. 2 H.4.  
8.23.Elix.M.5.

9.H.7.16.  
2, H.4.8.

28.H.8.Dyer.  
22.

28.H.8.Dy.19  
& 22.

which I promise to pay, &c. This being sealed and delivered, was held a good Obligation by *Brian* and *Constance*. So if the words had been only, I shall pay to *B.* ten pound, and whether such word or the like, as Covenant, or grant to pay, be in the forme of a Bill or Bond, or in an Indenture or articles, it is a sufficient ground for an Action of debt. And though it should be mis-written *Wigint.* for *Vigint.* or fitteene for fifteene, yet shall it be favourably construed, and held a good specialty of debt, as hath been resolved in these and like cases, and so also notwithstanding, false Latine in the Obligation, or the plural number for the singular number, or words of repugnancy or non-sence, yet if there be words, whereby it appeares that *A.* is a debtor to *B.* and be sealed and delivered, it is a good writing Obligatory; yea though want the words of conclusion, viz. *Witnessse* whereof, as the Lord *Dyer* reports, to have been resolved, although the contrary were held in foure severall Kings times before, as our Books shew. Now any such Writing

Obligatory doth determine or drowne any duty by Contract, because specialty is of a higher nature, So as if *A.* and *B.* doe bargain with *C.* to pay him a hundred pound for Corne or other things, and after *C.* take some such Writing Obligatory, as afore- said of *A.* now by this is *B.* discharged of the debt, because he stood charged onely by the Contract, which is extinguished by the said Specialty.

40. E. 3. 1. 7. H.  
7. 14. 8. H. 6. 36.  
22. H. 6. 15.  
21 E. 4. 81.  
3 H. 4. 17.  
11 H. 4. 76.

As for the extent and operation of these Specialties, to, and upon Executors, we must know that an Executor doth so represent the person of the Testator, and is so included in him, as that every Bond or Covenant by the Testator made for payment of money, or the like, reacheth to the Executor, although he be not named, viz. that hee doth not covenant for, nor binde him and his Executors by expresse words ( and yet the Heire not named is not bound, though there be never so great Assets, or land discend unto him.)

So reservation of rent, grant of annuity.  
28 Hen. 8. Dy.  
14. & 22.

47. E. 3. 22.  
32. H. 6. 32.  
10. H. 7. 18.

Now touching debts upon Record, much need not to be said (except of those by Statute Merchant)

No mention of Executor in the judgement, yet he charged.

for to debts and dammages already recovered against the Testator, and to debts by Recognizance the Executors liablenesse, is somewhat cleare and conspicuous. Yet other inferior debts upon Record, may fitly be thought of, as Issues forfeited, Fines imposed by Justices, at *Westm.* or at Assises, quarter Sessions, Commissions of Sewers, of Bankrupts, By Stewards in Leetes, or the like; for all these are debts of Record, which Executors stand charged withall. So also if the Testator were before Auditors found in Arrerages of Account, being a Bailly, or receiver: For these Auditors are by Statute Judges of Record, but if the Account were made only before the party to whom the Arrerage pertained, or but before one Auditor only, it is out of the Statute, which speakes of Accounts before Auditors in the plural number. Therefore the Executor not chargeable, because the Testator might wage his Law in those cases, not in the former.

And whereas exception was before made of a debt by Statute Merchant,

9.H.6.f.11.

11 H.4.64.92

Otherwise of a  
Garden in Soc-  
cage, he is out  
of the stat. W.2.

cap.11. ut credo

Co.L10.103.

it was by reason that the Lord *Bro.* tells us that if the *conusor* in that case be returned dead, no remedy appeareth for the Conusée to have execution of the Goods of the Conusor, but only of his Lands. If this should be thus, it were a very mischievous case: for many bound in Statutes have no Lands but Leases and goods of great value, and if by their death, these goods and Chattells should be set free from this Statute, and the Creditor without remedy, the Law were very defective: and it were so much the more strange in this Case, because the Statutes of *Action*, *Burnell*, and *Mercatoribus*, seeme to pitch principally upon Goods, and to tend unto assurance between Merchants, who usually are not Landed men. But that the Law doth give remedy in such Case, as well against the Goods as Lands of the deceased Conusor appears by the resolution of late, made in what order, and Precedence, Statutes are to be satisfied by Executors, as after wee shall see.

36. H.8. Bro.  
Stat. Mar. 43.

*Of Debts by Contract without Deed,  
as Leases Paroll, &c.*

21.H.6.1.

44.E.342.

44.E.3.5.

7 F.3.11.

14.H.7.4. per  
Keble vide 8.E.

Dy.247.

M.32. & 33.

Eliz. in com. &c.

Contracts are of divers kindes, and we will begin with those in the realty, as most worthy. If therefore one be Lessee for yeeres, or for life, without any Indenture or Deede, (as he may be) and his Rent being behind, he dieth, now is the Executor lyable to the payment of this Rent, without any Specialty, for that his Testator, if he had been sued in his life time, could not have waived his Law. But if the Lessee for yeeres, in his life time, sell or grant away his terme or Lease, although he still lie at the stake for the Rent, to grow due after, untill the Lessor accept the Assignee for his Tenant, Yet if the Lessee die, his Executor shall not be charged for any Rent due, after the death of his Testator. But what if the Lessee doe not Alien or assigne his terme, but die thereof possessed, and the Executor perceiving the Land not to be worth the Rent, waiveth the same. Yet the Lessor will

will not enter thereinto, nor inter-  
meddle therewith, whether may he yet  
charge the Executor with the Rent,  
during the terme? I answered, that if  
he have assets, that is sufficient for  
payment of this and other debts, he  
cannot Waive this Lease, but shall be  
bound to answer this Rent, though  
much more then the Land is worth,  
for the taking of the Lease is much of  
the nature of an Obligation to pay  
money; Yet because it is yearly Exe-  
cutory, the Executor may Waive it,  
because the Testators estate will not  
supply and beare that losse. But  
that if there be assets to beare this  
yearly losse for some yeares, but not  
during the whole terme? I thinke in  
this case the Executor must pay the  
Rent, so long as this Assets will hold  
out, and then must Waive the possessi-  
on, giving notice to the Reversioner;  
and this I thinke he may doe well e-  
nough notwithstanding his Occupa-  
tion of the Land divers yeers after the  
Testators death, because that was not  
voluntary, but as of necessitie; yet  
this I leave as a *Quare*, to be well ad-  
vised of with good counsell.

Dy. & Shi.  
121.

Of



41 E.3.15.

15 E.4.25.

Except by a

*Quo minus* in the exchequer, for the Kings debtor. *Co. lib. 9. f. 98. a.* So of accounts except for the King.

*M. 33. & 33. El in com. b. 1.* By three Judges, & 37 *Eliz.* By all, as I find in my report, but *Co. lib. 5. f. 82. b.* it is contrarily reported.

3 *Eliz. Dy.* 196. Demurrer.

9 E.4.51.10. H

7.8.15. E.4.16.

22. H. 6. 13.

39. H. 6. 186.

There though a common hostler or victualer, trust his guest, he loseth his debt by his death, *Co. 9. f. 87 b.*

## Of contracts personall.

**W**Here the Testator might w  
his Law there the Action  
eth not against the Executor; as ha  
been touched, and therefore he is  
chargeable in an action of debt up  
a simple contract, as by reason of  
or that to his Testator; yea thou  
it were the inheritance of Land, wh  
was sold, so as the sale were with  
Deed, or though by Deed, yet if  
counterpart were under the hand  
him to whom the sale was made. A  
the custome of *London*, to the contr  
ry, viz. that an Action of debt shou  
be maintained against Executors  
upon a contract was held void, at le  
no good plea against other Credit  
that such a debt was recovered again  
the Executors, or paid by him, as w  
towards the latter end of the la  
Queens time resolved, though in  
beginning of her time it was a d  
murer. Yea, though such a debt gro  
for the most necessary thing, viz. me  
and drinke, which bindeth even  
Infant to payment, yet will it  
charg

charge the Executor of a man of full age, but this is meant where the contract was only by word, for where the Testator putteth his Seale to any Deed or Writing made upon such sale, this is more then a simple Contract, and taketh from the Vendee his wager of law, and so chargeth the Executor. But if the Testator seal but unto a tale or tally, with scotches, expressing a debt, this is no such Specialty as shall charge Executors. Yet in some cases without any seale at all, the Executor is chargeable. But although no action of debt lyeth against the Executor upon such a simple contract, yet may the Creditor in that case, maintain an action upon the Case grounded upon the assumption implied, though not expressed, as now standeth resolved by all the Judges of all Courts at Westminister, though heretofore there hath been much difference of opinion thereabout: And indeed thus the Executor is charged, in matter for a simple contract, though not in manner of Debt; but as for breach of promise, taking reconpence in dammages, head of the debt. And the cheife rea-

22 H. 4. 23.

But if the sum be also written on it, they are bound as by a Deed, 28, H. 8. Dy. 23. a.

Slades Case,

Co. lib. 4.

Co. l. 9. 87. Pichons. Case.

2 H.4. 14.

4.H.6.16.

11 H.6.48. So  
2 H.4.f.14. Ser-  
vitors in the  
warreby con-  
tract.

reason for it is because the Testator could not have waged his Law in the action upon the case against himself though in debt he might. When the Testator retaineth servants in his bandry, or otherwise, and dyeth, the being wages due to these so retaineth the Executor is lyable to an action of debt for the same, by reason that the parties were compellable by Statute thus to serve, and therefore the Testator could not have waged his Law but in case of servants not compellable as Wayters or Servingmen, as we call them, no action of debt lyeth against the Executor, for their wages, though against the Testator himselfe it doth for the contract is sufficient to charge him who made it. See of account after.

*Where Executors shall be charged with  
out either Contract or  
Specialty.*

27 H.6.4.  
15 E.4.16. ca.  
lib.9.f.87.b.

**W** Here a Prisoner oweth money to a Jaylor or Keeper of Prison for his dyet, or victuals, and dyeth his Executor shall be chargeable for

is debt, because it is for the Com-  
 on wealth to have Prisoners kept,  
 which cannot be without affording  
 em victuals: Also, where one hath *No.n.br.121.a.*  
 Patent, or Tally of the Exchequer, He must have  
 receive money of some Customer, *a liberate also.*  
 ceiver, or other Officer of the  
 crown, and delivereth it to him, he  
 en having mony of the Kings in his  
 nds, if he pay not the same, but dye,  
 s Executor shall stand chargeable  
 ith the payment thereof. So for  
 rrages of Account before Audi-  
 rs, if more then one, but this is debt  
 Record in Law.

So if any Lord of free Tenants, doth  
 vy ayde of them for the marriage of  
 is eldest Daughter, and he dye before *No.na.br.82,83.*  
 e be marrycd, she may recover this *Westm.I.c.35.*  
 oney by an action of debt against his  
 Executor, but this is by vertue of a  
 statute. There is a president in the  
 ooke of Entries of an Action of debt  
 gainst the Executor of an Heire, by  
 which it seems that a man binding  
 himselfe and his Heires, and leaving *Lib.Inter.172.b*  
 ssets, the Heire taking the profit, be-  
 comes so a debtor, that his Executor  
 shall be charged. And in the Regi-  
 ster

Reg. orig. 141. a.

11 R. 2. 16 E. 2.

11 E. 4. Fitz.  
Ex. 77.See Co. lib. Intr.  
564. Such an  
action in York-  
shire.

ster there is a Writ against the Executors of the Guardian of the Spiritualties of the Arch-bishop of York, for the debt of B. who dyed Intestate, whose Goods came to the hands of the said Guardian, viz. the Deane of Yorke. In allowance whereof there is a note added of the like Writ brought in K. R. 2. his time, and then a president was alledged of for a Writ in King Ed. 2. his time, against the Executors of an Ordinary, and that they were enforced to answer unto it. So is the opinion of Trew, in the time of Edward the thrid. But Ald. opposeth him. Also the *Rationabile parte bonorum* by custome in some places is maintainable for the Wife and Children, against the Executor. But no action of account lyeth against Executors, except for the King. More hereof, tit. wrong.

### Of Covenants charging Executors.

WE have already touched upon Covenants in part viz. where they be expressely for payment of money, shewing the

the Executor nor the Assignee had  
 consented thereby, and therefore where  
 the Lessee for yeares covenants within  
 such a time to build a new house up-  
 on the Land, and dyes before that  
 time expired, I doubt whether the  
 Executor be bound to performe this,  
 or not; although it doe concern the  
 Landlet, so as perhaps the Rent or Fine  
 was the lesse, in respect of this charge  
 of new structure or building, which  
 is a great reason that the Executor,  
 though not named should be tied to the  
 performance: But if the Covenant  
 had been to build a house elsewhere  
 than upon the Land let, or to doe any  
 other collaterall thing, not pertinent  
 to the Land let, it is cleere the Execu-  
 tors were named to perform it: and  
 yet in those cases if there were a  
 breach, or non-performance in the  
 Testators life time, as that the time of  
 performance were expired before his  
 death, then it is cleer the Executors  
 were bound to yeeld recompence by  
 way of dammages recoverable, in an  
 action of Covenant, as both *Shelley*  
 and *Fitzherbert* agreed, and so also  
 did the Lord *Popham* agree in the said of  
 case

Tr. 28 E

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Reg. orig. 141.2.

11 R.2.16 E.2.

31 E.4. Fitz.

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See Co. lib. Intr.

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case of *Hide*, as I finde in my own report of that case, though in the Lord *Cooke* reporting only the point in question that be not mentioned; Now let us consider of the case, where there is no expresse Covenant at all, so much as for the Lessor himselfe, but only a Covenant implied, or Covenant in Law, as we call it. As if Lessee for life, make a Lease for years, and dye within the terme, so as the Lessor is evicted by him in reversion, or remainder. In this case it was resolved in the late Queens time, by three Justices *viz.* *Walsh*, *Brown* and *Dyer*, that by this Covenant in Law, the Executors were not chargeable, and in the same case the Lord *Dyer* sets down another resolution after, to the same effect: but Master Serjeant *Bendloer* reporting this latter case to be of a lease made by the Tenant in taile, *viz.* before the Statute of 32. *Henry* 8. or warrantable by it, sets down the opinion contrarily, *viz.* that the action was maintaineable against the Executor. This may serve for instance, the like being in any other case, where the Lessor hath not a good, and a firm title.

*M. 8 & 9. El. Dy*  
*257. Intrat. M.*  
*7 & 8. El. rot.*  
*1137 Swanne*  
*vest. S. r. anshans*  
*& Searles.*

*1. rot.*

*Bro-*  
*indf.*

title

title, but perhaps subject to a Condition or other eviction, so as the Lessee cannot enjoy the Land according to his Lease. But this must be so understood, that no eviction, or breach of Covenant, is in the life of the Testator or himselfe, for if that be, there is no question, but the Executor stands chargeable; and therefore if one make Lease of Land by Deed, wherein he saith nothing; this Covenant is perhaps presently broken, and though the Lessor dye before an action of Covenant brought, it will be maintainable against his Executor, though no expresse Covenant. This is useful to be known, though in these times there be few Leases so made, without expresse Covenant, and the Executors also named. And where there is a speciall covenant in expresse words, it doth qualifie the Covenant so as although Words of dependence and grant tye the Lessor to a general Warranty of the title, against all men, yet it being after covenanted, that the Lessee shall enjoy against the Lessor and his Heires, or against all claiming under him or his Ancestors;

*Noke & Anders  
Case.*

Now no eviction by or under any other title, giveth cause of action, or bindeth the Lessor or his Executor, to make recompence.

*Of wrongs done by Testators, and whether Executors be lyable to demands.*

**A**Lthough Executors doe represent the persons of their Testators, yet if the Testator commit any trespassse upon the Goods of another, or upon his person, of Lands no action lieth for this against the Executor, for *Actio personalis moritur cum persona*; So if a Sheriffe, Jaylor, or Keeper of a Prison, suffer one in execution for debt or dammages to escape, though hereby the party, at whose suit the Execution was, be intituled to an action, viz. an action upon the case, against such Officer, by the Common Law, and by Statute, an action of debt; yet if he so suffering, die, for that such sufferance was a wrong of the nature of a trespassse, no action lyeth against his Executor for the same. And upon the same reason, as I presume, if one

41 Aff. p. 15.

40 E. 3. Fitzh.

Ex 74. Co. lib. 9.

87. a.

carry away his Corn and Hay, without setting out the Tenth; although the treble value be recoverable against him in an action of debt, yet if he dye before such recovery, the action is gone, and lieth not against his Executor; No not although the Testator were a Lessee for years, so as his state came to his Executor.

Like Law in other penall Statutes, as for arresting one at the suit of *I.S.* without his privity or assent; Or, for not appearing as a Witnesse, being served with a *sub pena*, and having charges tendered and many like; yea, if a Lessee for years commit waste and dye, no action lyeth against the Executor for this waste; for all these cases are within the rule of *actio personalis moritur cum persona*, and many other like Cases might be put, but these may suffice. Yet if a Parson, Vicar, or other spirituall, or Ecclesiasticall person doe suffer a ruine or decay of the houses or buildings upon his such spirituall Benefice or promotion and dyeth, his Executors are lyable, by the spirituall or Ecclesiasticall Law, to the successors Suit for a-

13 Eliz. c. 10.

mends to the repairing of such spoile or decay. And because some used fraudulently to grant away their Goods, so as nothing shall be left to their Executors, it was enacted *temp. Elizabeth*, that such Grantees of goods should be lyable to the successors suit, for these *dilapidations*, as if they were Executors.

As for one other case of this nature, *viz.* where an Executor wasteth the Goods of his Testator, or an Administrator the Goods of his Intestate, and dyeth. Whether his Executor be subject to Action for this or not; I adjorn the reader to that place where I shall treat of such wasting, or devastation by Executors.

Unto this head, not unfitly may be referred, what before is said of Actions against the Executors of the Debtors Heire, and the Executors of the Ordinary, for the Specialty, binding to payment reacheth not to any of these; but because their Testators should have payed these debts with the goods or profits of the Lands of the Debtor, and did not, but retained them to themselves; there

therefore for this as a wrong, are they  
 suable; as I take it. So also by the  
 same reason are the Executors of an  
 Administrator chargeable, where he  
 did neither pay the debts, nor leave  
 the goods to the next Administrator,  
 but otherwise disposed of them. Yet  
 an Executor is not chargeable in an  
 action of *Detinue*, nor of account  
 (except to the King) for the Testa-  
 tors detaining, and not paying or  
 answering things received, or under  
 his charge.

And the reason why, after account  
 made before Auditors, and the Bailly  
 or receiver be found in Arrerages and  
 die, that in this Case his Executor is  
 chargeable, is, because the Auditors  
 are made Judges by the Statute, *West.*  
*2. cap. 11.* and so this Arrerage which  
 they have judged, is a debt by Re-  
 cord.

But if the case be put on the other  
 side, *viz.* that the Bayly, or Receiver,  
 have found in surplusage upon his  
 Account, *viz.* that he hath laid out  
 more in his Lords or Masters busi-  
 ness, then his receipts amounted un-  
 to, and then his Lord or Master dyeth,

I conceive no  
 difference be-  
 tween this and  
 the other cases,  
*supra.*

2.H.4.13. He  
 may by admit.  
*Co.lib. 11.f.88.*

3.H.6.35.  
*Con.* for arre-  
 rages of an ac-  
 count before  
 auditors, 11.H.

4. 64.91,92.  
 9.H.6.12.

13. Ed. 1.

60.lib.9.f.87.a. now shall not he have any action against the Executors, for the surplussage, because it is out of the purview of the said Statute.



## CHAP. XII.

*Of the Order and method to be used by Executors in payment of Debts and Legacies, so as to escape a devolution or charging of their own goods.*



WE have gone through and dispatched the two first proposed parts, viz. 1. Touching the being of Executors, and the manner of their being. 2. Their having, and the manner of their having. We come now to the third part, viz. their doing or disposing of the Testators Estate.

Now

Now this consists principally in the issuing of money, though partly also in delivering or assenting to the Execution of Legacies, not being money, but other goods or chattels bequeathed.

Money is to be issued by Executors, foure wayes ordinarily.

*Viz.*

1. About the funerall of the testator.

2. About proving his Will.

3. In paying of debts.

4. In Paying and satisfying of legacies pecuniary.

As for the first, burialls be of necessity for two respects, *viz.* 1. Of charity to the dead, that he may be Christianly and seemely interred. 2. To prevent and avoide annoyance to the living, who by the very view of dead carcases, would both be affrighted, and within a few dayes distasted at the nose. Wee know that under the law, the touching of a dead carcase made a man unclean, and to need purifying: nor can we easily forget what the sisters of *Lazarus* said to our



our Saviour touching their brother when he had been dead two or three dayes : viz. that the taking of him out of his grave, must needs bring noysome favor. Hereabout there fore some expence is necessary, and that not only for fees to be payed which in *London* amounts to a considerable summe, specially for such as are to be buried within the Church but also otherwise, viz. for the Pall or Hearse-cloath, the ringing, &c. As for feasting, and banquetting, seems not to me congruent to the heavinesse and dolefulnesse of the action in hand. But howsoever that be, yet where the Testator leaves not sufficient goods to pay his debts, festive expence is to be forborn, except the Executor will out of kindnesse bear it with his owne purse; for dead debtors must not feast, to make their living creditors fast. I mentioned a considerable amount of funerall fees payable in *London*, and surely (to my thoughts fall back upon it a little) it is worth consideration, whether that kinde, and especially for those who dying there, are yet carried into their

their countries to be buried, the ex-  
 ation be not either unjust altogether,  
 too onerously excessive, so also for  
 much ringing contrary to the Canon  
 made at the Convocation in the first  
 year of King *James*.

The next thing mentioned to justi-  
 fy and occasion expence, is the pro-  
 ving of the Will: But this way a  
 greater disbursement (except for ri-  
 ding charges, or by reason of oppo-  
 sition by a caveat put in, or the like)  
 will not stand allowable, than is pre-  
 scribed by the Statute made in the  
 time of *Hen. 8.* whereby the fees of 21. H. 8. cap. 5.  
 Ordinaries, and their Scribes, Regi-  
 strars, and Officers be limited. And it  
 is strange that these bounds have been  
 so much, and so frequently broken and  
 transgressed, the rather, for that long  
 before, in the time of King *Edward* 13. Ed. 3. cap. 1.  
 the Third, by an Act of Parliament, it  
 was provided that the Kings Justices  
 should as well at the Kings suit, as at  
 the parties grieved, enquire after  
 such oppressions, or extortions, for  
 they be called; yea *S. Germ.* who Do. 2.  
cap. 1  
 is no stranger to the civill and can-  
 on law, as appeares by his book, saith  
 that

that the Ordinary ought to take nothing for the probate, if the goods suffice not for funerall and debts; but he meanes onely that conscience is against it.

Now we come to the third occasion of disbursement, *viz.* payment of debts which is the main part of our business. Wee have before seen what debts lye upon Executors, having assets to pay them; we are now to see in what order they must pay them, well *Ut sint fidei dispensatores*, as for their own indemnity, *ne quid res capiat detrimenti*. To put our selves into the better order or method of handling these things, we will sort our debts into their severall kinds thus.

They are of these three sorts,  
*viz.* either,

- 1 Debts of or upon record.
- 2 Or debts by specialty.
- 3 Or debts without specialty.

The debts upon record may be again divided into four sorts or kinds  
*viz.*

- 1 Debts to the King or the Crown

Debts by judgement or recovery  
in some Court of record.

Debts by recognizance.

Debts by Statute staple, or statute  
merchant.

Amidst these, the debts to the  
Crown are to have the first place or  
precedence, so as if there be not come  
the Executor goods of greater va-  
lue then will suffice for the satisfaction  
of these, he is not to pay any debt to  
any subject, and if he be sued for any  
such, he may plead in Barre of this  
debt, that his Testator died thus much  
indebted to the King, shewing how,  
&c. and that he hath not goods sur-  
mounting the value of that debt. Or  
if the subjects pursuit be not so by  
way of action, as that the Executor  
may day in Court to plead, but be  
by way of suing execution, as upon  
statute marchant, or staple, then is the  
Executor put to his *audita querela*  
wherein he must set forth this matter.  
And there is great reason why the  
Kings debts should thus be preferred  
before any subjects, viz. for that the  
Treasure Royall is not only for susten-  
tation and maintaining of the Kings  
house-

M. 33. & 34.  
Eliz. the Lady  
Walsingham's  
case in *com. ba.*  
& Tr. 39. Eliz.

Lib. I.

household, but also for publick services, as the warres, &c. as appears by the statute, 10. *Rich. 2. cap. 1.* And therefore it is, as I conceive, that *Bracton* saith of the treasures or revenues Royall, *Roborant coronam* they do strengthen or uphold the Crown. And for the like reason as I think, did God enact touching the possessions of the Crown, that if they were given to any other than the Kings own Children they should revert and come back to the Crown the next Jubilee, which was once in fifty years, *sed de hoc* *saith* *Bracton*. But this priority of payment of the Kings debt before the debt of any subject, is to be understood only of debts by or upon record due to the King and not of other debts. If any ask how the King should have any debts which shall not be of record, first by the statute 33. of King *Hen. 8. cap. 39.* it is enacted that all Obligations and specialties taken to the use of the King shall be of the same nature as the Statute staple: To this I answer, that there may be summes of money due to the King upon woodsales or sales of Tinne, or other his minerals, for which

E. 4. 21, 22.

must it be

M. 33.

which no specialty is given; so also  
 payments in his Courts Baron, or  
 Courts of his Honours, which be not  
 Courts of record: The like of fines  
 or copyhold states there. So of the  
 money for which straies within the  
 Mannors or liberties are sold.  
 as the law hath lately been taken  
 ruled in the Exchequer, even  
 by contract due to any subject,  
 by his outlawry or attainder for-  
 feitable to the Crown. Yet neither  
 those due to such person out-  
 lawed or attainted by bond, bill, or  
 arreage of rent upon lease is or  
 be any debt of record untill office  
 thereupon found; for although the  
 outlawry or attainder be upon re-  
 cord, yet doth it not appeare by any  
 record before the office found, that  
 by such debt was due to the person  
 outlawed or attainted. Thus are not  
 these debts to the Crowne to have  
 priority of payment before the sub-  
 jects debts, though the Kings debts,  
 the record are so to have; so that if a  
 subject to whom the Testator was in-  
 debted by specialty sue for this Debt,  
 the Executor must plead that the Te-  
 stator

And must  
lead the record  
in certain as  
was held in the  
case of the Lady  
Walsingham,  
M. 33 & 34.  
Eliz. but it suf-  
ficeth to say, by  
a record of the  
Exchequer as  
was held Tr. 39.  
Eliz. in b. reg.

stator dyed indebted thus much to the  
King by record, more then which he  
left no goods to satisfie; if the truth  
of the case so be, for if there be suffi-  
cient to satisfie both, then the subject  
creditor is not to stay for his debt, till  
the Kings debt be levied. And if the  
subject creditor sue Execution upon the  
statute, so that the Executor has no  
day in Court to pleade this debt due  
the King, then is the Executor bound  
to an *audita querela*, wherein he must  
set forth that matter, and so provide  
for his own indemnity. But what shall  
we say of arrerages of rent due to  
the King? surely where it is a fee  
farme, rent, or other rent of inheri-  
tance, I see not how it can come under  
the title of debt; since for it, no action  
of debt is maintainable so long as the  
state continueth in him to whom it  
grew due, and I finde that the *Lo. D.*  
*er, M. 14. Eliz.* said that the King  
could but onely distraine for his rent  
and not otherwise levie them on his  
lands or goods; and that the King by  
his Prerogative may distraine in all  
other lands of his tenant, our books  
tell us, but no more. Yet I know

hath been otherwise done of late in  
 the Exchequer, which if it have been  
 the ancient and frequent use of the  
 Exchequer, it will stand as Law  
 though unknowne to the *Lo. Dyar.*  
 Now rent upon a lease for yeers diffe-  
 rent from the other, since for the ar-  
 rages thereof an action of debt ly-  
 eth, but how can either of these be  
 debts of record, when the not pay-  
 ment may be either in the Court of  
 Exchequer, or to the receiver general  
 or particular? and how then can there  
 be any certaine record of the not pay-  
 ment, so as to make any certaine debt  
 upon record? Wee know Statutes  
 have been made to make the lands of  
 receivers subject to sale for satisfacti-  
 on to the Crowne; and besides that  
 some ancient Patents direct the pay-  
 ment of Fee-farmes into the hands of  
 Sheriffes, the Statute of *Westm. 1. cap.*  
 provides remedy for the King a-  
 gainst Sheriffes not answering the  
 dues of the Crowne by them recei-  
 ved: so as the Kings Farmer or debtre  
 may have paid his rent or other debt,  
 yet the Crown have not yet received  
 Of fines and amercements in the



Kings Courts of Record, there is no doubt but they are debts of Record.

Come we now to the debts of subjects, and first those of record; touching which, I shall not be able to hold so good a method, and so well to handle things by parts as I would, for the parts so stand in competition one with another for precedencie, as that they must of necessity thereabout conflict and interpleade one with the other, and contest one against the other: yet for the Readers better ease and ability to finde out that which may concerne him in his particular case, I will in the best sort I can sing out these things into severall parts and place them in severall roomes or stations. First, considering how they shall stand betweene one judgement and another, had either against the Executor or Testator. Secondly, how between judgements and statutes, recognizances. Thirdly, how betweene recognizances and statutes. Fourthly, how betweene one recognizance and another. Fifthly, how between one statute and another,

ing to each some observations incident.

Now next to the debts of the Crowne are judgements or debts recovered against the Testator, to have priority or precedencie in payment, being of an higher nature, or more dignity than any other, for that statutes and recognizances, though they take debts upon record, yet are they forgotten but by voluntary consent of parties, whereas in every judgement there hath been a course and course of Justice against the will of the defendant, as is presumed; and is in a Court of Justice, and the records of such judgments are entred in publicke rolls, not kept or carried in pockets or boxes as statutes, and still inrolment recognizances are. Therefore Executors must take heed to such judgements against their Testators, before debts any other way, if they have not sufficient for both, be satisfied: lest they draw the burden of this debt upon their owne pockets. Now their way to helpe themselves being sued, or pursued for other debts, is the same before

*Co. l. 5. f. 28.*

*So Wray and Gandy inter Bond & Bales.*

*28. Eliz. vel*

*circiter.*

Yea though a writ of Error by the Executor to reverse the judgement yet suffering a statute to be executed, must pay of his own.

*Read & Bear-blocks case. P.*

*43. Eliz. Ba. re.*

So held in *Reades case supra. vide 12. H.*

*7. Kew. 24. 25*

to like purpose.

fore delivered touching debts upon record to the Crowne, viz. by plea, where they may pleade, as in *Scire facias*, upon a Recognizance or suit upon band, and by *Audita querela*, where they cannot pleade, as when Execution is sued upon a statute. And if they had no warning in the *Scire facias*, but upon *nihil* returned the judgement passed, there also the Executor may be releevd by *audita querela*, because there was no default in him that he did not pleade or set forth the judgement upon the suit in the *Scire facias*. Nor will it be any plea for the creditor by statute to say that his statute was acknowledged before the judgement, and so is more ancient for a latter or more puiſne judgement is to be preferred before a statute in time precedent. But if this judgement be satisfied, and it only kept on foot to wrong other creditors, or if there be any defeazance of the judgement yet in force, then the judgement will not availe to keep off other creditors from their debts: And thus much touching debts by judgement viz. how they stand in priority

Co. lib. 4. f. 59.  
So *Periam* in  
com. ba. inter  
Charnock and  
Worsley. 34. *Eli.*  
vel *circiter*.

Co. lib. 5. f. 28.  
Co. lib. 8. f. 132.

fore other debts by statute or recognition. Now to see how they stand among themselves, let this be observed, viz. that betweene one judgement and another had against the Testator, precedencie or priority of time is not materiall, but hee which first sueth Execution must be preferred, and before any Execution sued, it is at the election of the Executor to pay whom hee will first, yea, if each bring a *Scire facias* upon his judgement, the Executor may yet confesse the action of which he will first, notwithstanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the defendant may pleade generally that he hath fully administred before the *Scire facias* brought, without shewing that he did administer in payment of debts of as high nature; yet that must be proved upon the evidence, else the triall will fall out against the Executor. Thus have I delivered the most materiall things in my apprehension touching debts by judgement; yet thereabout I will adde for the better information of the Reader, not studi-

So held in 15.  
& 16. Eliz.  
So in the *Scire fac.* by bond against *Bales* it was held.

ed in the Law, these few things. First, that what hath been said is onely to be understood of judgements against the Testator, and not of any against the Executor himself, for of those being but debts by specialty at the time of the Testators death wee shall speake after. Secondly, what is said of the Testator in case of an Executor immediate, is likewise to be understood of the Testators Testator, in case of the Executor of an Executor, for where *A.* makes *B.* Executor, and *B.* makes *C.* Executor, there the goods which came from, or were left by *A.* be not in the hands of *C.* lyable to judgements had against *B.* Nor on the other side, are the goods of *B.* in the hands of *C.* subject to the judgements had against *A.* And the like is to be understood of statutes, Recognizances and bonds, as elsewhere is somewhat touched. Thirdly, Recoveries or judgements by meere confession, without defence, are yet of the same nature, and to have the same respect as other recoveries upon triall or otherwise; for although they may seeme to be but of the nature of Re-

nizances which be *debita recognita*, yet doe they differ from them, in that here a debt is demanded by a Declaration, which is intended true, and that therefore the Defendant cannot denie it, but in case of a Recognizance it is not so, for there usually no action is entered, nor debt demanded. Fourthly, the foresheved respect to debts by judgement, is not to be inclosed within *Westminster Hall*, and be restrained to the foure Courts there, but may and must extend it selfe to judgements in other Courts of Record, *viz.* in Cities and Townes Corporate, having power by Charter, or prescription to hold plea of debt above forty shillings, as in *London, Oxford, &c.* For although there Execution cannot be had of any other goods than such as be within the jurisdiction of that Court, yet if the Record be removed into the Chancery by *Certiorari*, and thence by *Mittimus* into one of the Benches, so Execution may be had upon any Goods in any County of England. Fifthly, in case where the Testator was bound in a Recognizance and a *Scire facias* brought

*Que.* of arrerages of account before Auditors without suite, for the Executors are charged by judgement of the Auditors, by stat. *W. 2.* judg. of record. 10. *H. 6.* 24, 25. *Br.* dett. 183.

Quæ. of judge  
ment in a writ  
of Annuity for  
arrearages after.

brought against him, and thereupon judgement given; Although this judgement be not *quod recuperet*; as in case of actions of debt, but *quod habeat executionem*, yet since execution is the life, fruit, and effect of all judgements this may now well stand for a judgement, as I take it.

### Of Recognizances and Statutes.

**N**EXT unto debts by judgement, are those by statute or recognizance to be regarded by the executor. And because I finde no difference of priority or precedency between these two, I therefore ranke them together; yet one reason of preferment given to judgments before statutes in *Harison* case, viz. that the one remains a record upon the roll in the Kings Court whereas the other being carried in the pocket of the ~~comptee~~ is more private. This, I say, should give priority also to recognizances before statutes as also another reason, for that statutes are not properly records, but obligations recorded; yet doe I not finde that this makes a difference for priority

priority of payment. And indeed  
 the statute is the more expedite reme-  
 dy, since thereupon execution may  
 be taken out without any *Scire facias*,  
 or other suit, which cannot be in the  
 case of a recognizance; for there if a  
 writ be past after the acknowledge-  
 ment, no execution can be sued out  
 against the party himselfe acknow-  
 ledging it, without a *Scire facias* first  
 sued out against him: And if he be  
 dead, then though the yeare be not  
 expired, yet must a *Scire facias*, be sued,  
 and thereupon the Executor defend-  
 ent may plead some plea to hold off  
 the execution for a time. But this  
 notwithstanding, the Executor may  
 satisfy the recognizance before the  
 statute, at least if he doe it before exe-  
 cution sued thereupon; for they stan-  
 ding in equall degree, it is at his electi-  
 on to give precedency and preferment to  
 either he will. Neither is it mate-  
 riall which of them were first or more  
 ancient; nor between one statute & an-  
 other doth the time or antiquity give  
 any advantage as touching the goods  
 though as touching the Lands of the  
 debtor it doth; but as for his goods  
 in

Before *Sci. fac.*  
 not after voluntar-  
 ily, but if le-  
 vied by writ of  
*extent*, is good.



in the hands of his Executor, who ever first getteth hold of them by execution shall have the preferment. And before suing of execution, Executor may give precedence of preferment to whom he will. Now some may object that there is no course nor writ of Execution for such conusee against the Executor, and if so, then statutes merchant, and of the staple, are in vaine spoken, and it is true that Master Brooke a Chief Justice of the Common Pleas in his new Cases professeth, that he knew not any remedy for the creditor out of the goods of the conusor at his death. But if this should be the Law we are very defective, for the substance of many, especially Merchants, for and among whom a statute merchant was provided, consisteth usually more in goods than lands; besides the plea of *Haribon* administrator of the goods of *Sidney* in barre of *Greene's* action of debt upon an Obligation, viz. that the intestate stood bound in a Statute staple to *London* and *Greene's* reply thereunto, that the same were Indentures of defeasance, no

*Bro. No. 6. 294.*  
*Stat. Mar. 43*

*Co. l. 5. f. 28. b.*  
*H. 40. Eli. rot.*  
 119.

want whereof was broken, and the  
 resolution of the Judges that the said  
 matter in the replication was good to  
 aid the Defendants plea. All this,  
 by, and the resolution of the Judges  
 in the Common Pleas in that case,  
 in the case between *Pemberton* and  
*Warram*, as also in the Kings Bench  
*Popham* and the rest of the Judges,  
 the Executors must satisfie judge-  
 ments before statutes, and statutes be-  
 fore Obligations, had been idle and  
 pouring of grosse ignorance, if no  
 execution at all could be had against  
 the Executors of him bound in a Sta-  
 tute and then should *Greene* have de-  
 curred upon the plea of *Harison* and  
 needed not to have pleaded that other  
 matter, but none of the Judges or  
 sergeants ever conceited any such  
 matter: that which there was replied,  
 that the statute was not forfeited,  
 were to be remembred, as good mat-  
 ter both against Statutes and Recogni-  
 zances, and that whether the Recogni-  
 zance have defeasance or condition  
 broken, so that the Recognizance  
 not forfeited. In none of these ca-  
 ses the Executor hindred from pay-  
 ment

P. 32. *Elix. rot.*  
 235. *in cont. ba.*

See *Co. lib. 5.*  
 91. execution  
 against an Exe-  
 cutor upon a  
 Statute, *Se-*  
*maines case.*

*Co. lib. 5. f. 28.*  
 So if satisfied,  
 though not  
 discharged.

ment of debts by specialty, nor can he be justified or excused if by colour hereof he refuse so to doe; and indeed else might creditors be exceedingly defrauded by Recognizances for the peace and of good behaviour &c. and so by Statutes for performing covenants touching the enjoying of Lands, if they should keep the payment of debts, and yet themselves perhaps never be forfeited, the summes become payable.

*Of Debts by specialty.*

**N**OW come we to debts due by specialty, viz bond or bill (which nature the greatest number of debts are) let us then see what course the Executor must or should hold for satisfaction of these, admitting that the Testator stood not indebted by any record, or that no forfeiture is of any such debt, or that there be goods in the Executors hands above the amount of such debts by record. This I say *data*, then according to the rule *proximus quisque* the Executor may satisfie himselfe

nor such debts, as the Testator by special-  
 color owed him: for such debts are not  
 and raised by the creditors taking upon  
 executor to be Executor to the debtor;  
 though on the other side, if the credi-  
 avior make his debtor executor, this is  
 perfect release of the debt. Although it  
 enjoyed given out or commonly spoken in  
 keepe generall, that an Executor may  
 the pay himselfe, yet is it to be under-  
 stood, with this caution or condition,  
 that the debt to him be of equall  
 right or dignity with the debts to o-  
 thers according to the rule *in equali ju-  
 rior est conditio possidentis*, for if his  
 Testator were indebted to other men  
 by any Statute, judgement, or recog-  
 nance, and to him whom he maketh  
 executor only by bond, or other spe-  
 cialty, then may he not first pay him-  
 selfe, that is, by paying of himselfe  
 or leave them unpaid whose debts are  
 of a higher nature; but if there be  
 sufficient for satisfaction both to them  
 and himselfe, then is it not materiall  
 which be first paid. Now touching  
 debts to other men the Executor  
 hath power to give preferment in pai-  
 ment to whom he will; so that if the  
 Testator

28 H.8.Dy.32.  
Doff. & St.ca.  
10.p.78.

Testator left but an hundred pounds being indebted to *A.* an hundred pounds, and to *B.* an hundred pounds by severall obligations, the Executors hath power to pay to *B.* his whole debt, and to leave *A.* altogether unpaid any part of his debt, so as he hath not commensed any suit before payment to *B.* But yet herein this difference is to be taken and observed by the Executors, that if the time of payment upon the bond of *B.* were not come at the time of the Testators death, then may not the Executors before the money to *B.* become payable, pay him and leave *A.* unpaid, whose money was presently due. Yet if *A.* should beare to demand or sue for his debt till the debt of *B.* become also payable, then is it at the will of the executor to pay whether of them he will, for the other may lose his whole debt, if the goods will not suffice to pay both. What if *A.* have onely by word commanded his debt, and not by suit before the debt to *B.* become payable, whether doth that hinder that the Executor may not now when the money to *B.* is also payable, pay him and leave

*A.* unpaid. And hereunto *S.*  
*m.* answereth negatively, making  
 verball demand to be idle and of  
 value: yea; he addeth that if *A.*  
 commenced suit before the debt  
 become payable, yet if the Exe-  
 cutor can delay the suit till the debt  
 become payable, so that *A.* can  
 have no judgement before that time,  
 before *B.* hath commenced suit  
 on his hand, then may the Execu-  
 tor confesse his action, and so pay his  
 debt leaving *A.* unpaid. But of this  
 there is some doubt, for that I finde in  
 King *Edw.* the fourth, some ad-  
 mittance, that if *A.* having a Tally,  
 or other warrant from the  
 king for receipt of money, of or from  
 a customer or receiver where others  
 had like warrants before him, but *A.*  
 maketh the first demand, now must  
 the officer first pay him or else himself  
 shall become debtor to, him if he first  
 pay others whose demands were after  
 his, though they had warrants be-  
 fore *A.* Likewise there is as to me it  
 seems, some admittance in the same  
 book, that the very demand made  
 by a creditor of his debt from an Exe-  
 cutor,

*Do. & St. p. 73.*

*Qua.* If then  
 he may not  
 plead this  
 judgement *post*  
*ult. contin. a-*  
*gainst A.* as he  
 may plead it  
 against other  
 suits after com-  
 menced. *Colib.*  
*intr. 148. 269.*  
*149. a.*

cutor, who hath then Assets in  
 hands doth intitle the Creditor,  
 recover damages against the Execu-  
 tor out of his owne goods; which  
 if it so bee, then doth even that ver-  
 ball demand lay some tye or Obliga-  
 tion upon the Executor for payme-  
 But hereabout, I lay downe nothing  
 peremptorily. Wee partly may de-  
 cerne by the premises how the Exe-  
 cutor is to guide himself in choo-  
 where there be divers debts by Spe-  
 cialty, all due, and payable at the  
 Testators death: before any suite  
 commenced for any of them, for  
 that case cleerely, the first verball de-  
 mand gives not any precedence,  
 being due, and so standing in equal  
 degree; And this is implied in  
 ny Bookes, making the commen-  
 ment of the suite onely that which  
 titles to priority of payment, or  
 least restraines the Election of the Exe-  
 cutor. Yet admit that one creditor  
 first doth begin suite, if others  
 after sue before he be paid, or  
 judgement; now cannot the Exe-  
 cutor pay him first, who first commen-  
 sed suite, but he who first hath judg-  
 ment

41 E.3. Fitzh.  
 Ex.68.6. & 7.  
 El.Dy.232.vi-  
 de 21. H.7.  
 Kelm.74.

ment must first be satisfied. And the Executor may herein yeeld helpe to one before the other, viz. by essoignes or complances or dilatory pleas to the one, and by quick confession of the others action; for he is not bound against his will to stand out in suit, and to spend costs where the debt is cleere, nor is this convine but lawfull discretion, which conscience will also approve some good consideration inducing. Nay after suit commensed, at least untill the Executor have notice thereof, he may pay any other creditor first, and then plead that he hath fully administered before notice. Nor is the Sheriffes return of summons or equivalent sufficient cause of notice, for in the summons might perhaps be upon the Land; but if it were to his person, which is notice sufficient, and then to save himselfe, he must say that he was not summoned till such a day, before which he had fully administered; yet subtle the Executor may be arrested at the creditors suit in some sort, which yet shall be no sufficient notice of this debt. As for the purpose, if he be sued by *Latitat* out of the Kings Bench,

5. Hen. 7. 27.  
So *Walmesley*  
inst P. 39. *Eliz.*  
in Error. al.  
Serjeants Inne.  
Co. lib. Intr. 269.  
such a recovery  
by confession  
is pleaded a-  
gainst another,  
and admitted  
good and f. 148  
149. Do. & S. p.  
78. b.



So also was it  
said Tr. 29. Eliz.

bench, this supposing a trespassse given  
no notice of a debt, so also of a *Sub-  
pena* out of the *Exchequer*; but the  
Originall returnable in the common  
plees expresseth the debt, and so in  
some sort doe the processe thereupon  
And therefore it seems by some books  
that if it be laid in the same County  
where the Executor dwels, he must  
take notice of it at his own perill. But  
this I take not to be Law, nor is there  
any great opinion that way: and al-  
though to make it more cleere, the  
Executor in King *Henry* the fourth  
his time, estrangeing himselfe from  
notice of the suit before payment  
others, did alledge that the action  
was laid in a forren Country; that  
no great prooffe that if his  
had been in the Country, when  
the action was brought, he must have  
taken notice; but thus it was cleere  
and a little surplussage hurts not. Now  
between a debt by obligation, and a  
debt for a rent or dammages upon  
Covenant broken, I conceive no dif-  
ference nor any priority or preceden-  
cy, but it is at the Executors discre-  
tion to pay first which he will, as

were by bond. So also of rent<sup>s</sup>  
 behinde and unpaid as I conceive, but  
 touching them principally intending  
 upon leases for yeares divers  
 considerations are to be had, and  
 some distinctions to be made, as first,  
 between rent behinde at the time of  
 the Testators death, of which that be-  
 fore said, is to be understood, and that  
 which groweth behind, after, next, be-  
 tween suit for the rent by action of  
 debt, and by distresse and avoury. As  
 the first difference, if the rent grew  
 since the Testators, death, then is  
 not accounted in Law the Testators  
 debt, for only so much is in Law ac-  
 counted assets to the Executor as the  
 profits of the lease amounted to over  
 above the rent, so as for that rent so  
 behind the Executor himselfe stands  
 debtor, as hath been resolved, and  
 therefore he is suable in the *debet*, and  
*detinet*, whereas for rent behinde in  
 the Testators life, and all other the  
 debts of his Testator he must be sued  
 in the *detinet* onely. Hence it must  
 follow as it seems, that an Executor  
 sued for debt upon bond, or bill, can-  
 not (except in some speciall cases)

plead a payment, or recovery of rent  
 grown due since his Testators death  
 though of rent behind at the time of  
 his death it be otherwise. And yet  
 here againe another difference or dis-  
 tinction is to be taken, *viz.* where the  
 profits of the lease exceed the rent, and  
 where the rent is greater then the  
 yearly value of the profits, for every  
 then as else where is shewed, the Ex-  
 cutor if he have assets, is tyed to the  
 holding of the lease, and payment of  
 the rent, and consequently doth pay  
 much of that rent as exceeds the year-  
 ly profit, stand in equall degree with  
 the Testators debt with other debts  
 specialty; and yet againe to recom-  
 der this point, what if the debts of the  
 Testator by specialty payable prefer-  
 ly at his death, or before the time that  
 any rent can grow due upon this lease  
 shall amount to the full value of the  
 Testators goods; may not the Ex-  
 cutor though he doe not pay the  
 debts before the rent day (for that  
 would make the case cleere) waive the  
 terme; for if he may, then happily  
 if he doe not so, but shall by payment  
 of any of this rent want goods

rent pay any part of the debts by specialty,  
 death it may lie upon himfelfe, and his own  
 ne of goods, as happening by his own de-  
 d fault. But on the one fide, it may  
 or be faid, that he could not waive it fo  
 reth long as he had affets, becaufe thereby  
 t, and he flood equally liable to pay that  
 n the debt being once due, as the other debts  
 even by specialty. On the other fide, it may  
 Ex be faid, that though the debts for rent,  
 roth and upon bond, fhall be admitted to  
 ent in nature equall, yet the cafe being  
 oth out of rent not due at the time of the  
 ye Testators death, it was not then a  
 w debt nor duty, whereas a Bond makes  
 bo a prefent debt, and duty, though not  
 co prefently payable, the day of payment  
 of being not yet come, fo as this latter is  
 re discharged by a release of debts, or du-  
 e the ties, and fo is not the former. So to  
 le leave that point unrefolved, let us  
 of next fee whether in fome cafe, though  
 Ex the rent exceed not the yeerly value  
 th of the Land, yet even that payable af-  
 or ter the death of the Testator may not  
 ve and in moft part, if not wholly, upon  
 app the Testators fcore as his debt, as well  
 ym as if it had been payable before his  
 do death. *Posito* then that the whole or

halfe years rent is payable at the annunciation of our *Lady*, and that the Testator dieth two or three dayes or some like short time before that feast now certainly should the Law be reasonable, if it should lay this debt upon the Executors shoulders in respect of those few winter dayes profit which he tooke. But surely since the taking of the profits induceth the Law to lay the rent upon the Executor as his own debt; therefore as where the Executor had the profits for the whole year or half year, except some few dayes incurred in the Testators lifetime: those few dayes will be unregarded according to the rule, *De minimis non curat lex*, and the whole rent shall lie upon the Executor as his own debt; so on the contrary part, where the whole year or half years profit, except some few daies incurred after the Testators death, the rent becoming payable so instantly after the Testators death must in reason lie wholly upon the Testators estate, as to me seems. What if to this I adde that the Testators Cattell wherewith the ground was stocked doe depasture

and devour the profits all the time after the Testators death, till the day of payment of the rents? Nay if the rent were payable at *Mich.* and the *Annunc.* and the Testator dieth a few dayes after *Mich.* the rent being of or neere the value of the Land, it will then be hard that the Executor shall for this winter profit pay the rent out of his own purse, especiall if the whole years rent be payable at that one day, as in some cases it is; or if the whole years profits were taken in the summer as in case of a lease of tithes, it is so also of meadow grounds usually drowned in the winter. So if the lease be then to end not having a summer half year to succeed, and make amends for the winter: or if the winter half year be the latter halfe, the Lease beginning at *Lady-day*, so that there is but a summer for each winter following, and not any for the winter passed. Of the like consideration with these is the case of a lease of woods for a rent which being fellable but once in eight or nine years; now if the lessee, having made the last sale, and felling before his death, the Law should cast the rent

upon the Executors own estate for the  
time future, it should lay losse upon  
him, which is against reason, and con-  
trary to the nature, and disposition of  
the Law even in this particular. As  
appears by this, that she enables an  
Executor to pay himself before any  
debt of equall nature, so as she more  
tenders an Executors indempnity  
then any other Creditors; there-  
fore I think that with, and upon the  
differences above shewed, even  
Rent growne due after the Testators  
death may in some cases be the Testa-  
tors debt payable equally with debts  
by bond. But here I conceive, that  
the Executor were in such case of de-  
stitution of assets as might justifie his  
waiving of a Lease over-rented, he  
then may waive these termes residue  
because for the future, the profits will  
come short of answering the rent  
though at the first, and so in the tot-  
tall, the profits did exceed the rent.  
And if for want of waiving, when  
he might, this rent fall upon him, the  
payment thereof would be no excuse  
against another creditor, nor as to  
him be a good Administration, for

*quantia juris non excusat.* This is  
 upon a point pertinent to our present considerati-  
 on, which debt may with safety be  
 paid, leaving another unpaid; and  
 the hazard of Executors, by igno-  
 rance of the Law, hath been a princi-  
 pal motive to my writing these Dis-  
 courses in English. Hitherto wee  
 have only considered, as I thinke, of  
 debts, as they be recoverable by  
 action of debt. Now let us see if there  
 may not be somewhat different consi-  
 derations touching distraining for  
 arrears, and so coming to recover it  
 by avowrie. Put wee then the case,  
 that an Executor hath fully admini-  
 strated in payment of debts by bond,  
 and after the lessor or reversioner  
 hath commeth and distraineth for arrear-  
 ages of rent due in the Testators life;  
 will the Executor in barre of the a-  
 vowrie plead fully administred, as he  
 might have done if an Action of debt  
 had been brought for these arrearages?  
 Doubtlesse I think no, nothing shall  
 hinder the levying of the rent upon  
 the land, so long as it is enjoyed un-  
 der the title of the lease, except the  
 land come to the King, upon whose  
 pos-



possession no distresse can be taken: thinke therefore that the Executor who paid out of his owne purse to the value of this lease (for so I intend the case, and else could he not have fully administred, as in the case was put before he should, I say, have abated in the price and valuation of the Lease, as well the arrerages of rent, as the rent futurely payable, both being equally leviabie upon the land, and he so have done, he is no loser by payment of this arrerage: but if trusting to the power of an Executor, and without the plea of fully Administred, he did not so, but disbursed in respect of the Lease, to the full value without such abatement, he must beare the losse of his owne ignorance. He might alwayes another way have helped himselfe *viz.* by payment of that arrerage, leaving other debts by Specialty unpaid. And what if suits were presently commenced upon the Testators death before he could make payment of the rent behinde; whether might the Executor then pleade this debt for the rent, as he might a debt by judgment or statute, and surely me think

It is probable that he might, because  
 it is a debt from which he cannot be  
 freed by payment of the other debts  
 owed for by Specialtie. If the rever-  
 enditioner would also commence suit be-  
 fore judgement had for the creditor  
 by specialty, then might the Execu-  
 tor helpe himsele by confessing his  
 debt first; but this perhaps the re-  
 veritioner would not conceive safe for  
 him, since that way the other might  
 get judgement before him, and so he  
 might lose both his suit and his debt,  
 whereas holding himsele to the  
 course of distresse, the Lease con-  
 tinuing, he hath land at the stake, for  
 such debt. What if he distraine and a-  
 ppeale now? may not now the Executor  
 pay him, or at least confesse his Acti-  
 on or Avoury, so as he first having  
 judgement, may first be satisfied.  
 Surely after suite commenced, I see  
 how the Creditors by bond can so  
 be prevented, at least without judge-  
 ment had for the rent; yea, though  
 such a judgement be had, yet because  
 judgement in that case is not that  
 shall recover the summe due for  
 rent, but only that hee shall have a

re-

return to the pound of the cattell distrained for the rent, it is questionable whether the paiment thereupon of the rent shall prevent the judgments after had in the suits upon the bonds. But I thinke it shall, because although it be not an expresse recovery of the rent, yet is it such a judgment compulsory for the same, and makes the payment inevitable and of necessity. And where before we have made the question only between the said rent-debt, and the debt by Obligation: let us now put the case between the rent-debt, and the debt by Statute or judgement. If then the Lessor after death of the Lessee distrains for the rent behinde part of the Testators cattell, and after there comes a Writ of Execution upon judgement or statute of the Testator whether shall these beasts in the pound for rent be delivered in Execution, or not, admitting that without satisfaction there be not goods sufficient for satisfaction of the judgement or statute. And surely I thinke they cannot be delivered in Execution: First, for that they are in the custody of the law,

String-fellows case, though there See 13. R. 2.  
 the Kings Prerogative overtopped Bro. Pledg. 31.  
 that point; yea, so I thinke, though Attainder of  
 they be replevied, for that they are to the party di-  
 returned to the Pound, if judge- strained shall  
 ment passe for the Avowant, to which uot take away  
 purpose securitie is given, so as they the distresse.  
 but in the case of a Prisoner bai- Vide Dyer.  
 , and, who still is in some sort in custo-  
 d. Secondly, for that this rent in-  
 dent to, and descendible with the  
 version, breeds a debt of a reall na-  
 ture, and so of more dignitie and  
 worth than debts personall. Thirdly,  
 for that the land let (as in a sort deb-  
 ) stands chargeable with this Di-  
 stress from the very time of making  
 the Lease, as either by a contract real  
 of *quid pro quo*, or rather by an ope-  
 ration of Law or legall constitution,  
 or ancient custome of the Realme,  
 without any contract of persons. Last-  
 ly, for that the Lessor doth not di-  
 straine the Cattell therefore, or in  
 that respect, for that they are, or were  
 goods of the Testator, but for that  
 he found them Levant and Couchant  
 upon the land, which must afford his  
 rent, or a distresse for it, if behinde,  
 so

so as if they had been any under-  
 tenants or strangers Cattell, they  
 might have been distrained. Some  
 may perhaps object this reason, why  
 these impounded cattell should be  
 delivered in execution, *viz.* for that  
 where otherwise the Creditor by sta-  
 tute or judgement should lose all or  
 part of his debt, yet by this release  
 done to him shall not the Lessor lose  
 his rent, for that he may at any time  
 after distraine any goods or Cattell  
 found upon the ground at any time  
 during the continuance of the Lease.  
 But here besides the point of delay  
 and stay of his rent, which to many  
 is the sole meanes of maintaining their  
 households and families; this further  
 considerable, that perhaps the Lease  
 may be neere expiring, perhaps  
 highly racked and rented, even to  
 above the value, as that the Execu-  
 tor having his Testators stock taken  
 from it, and him by Execution, will  
 not stock it any more, and so the land  
 lying fresh, if the Lessor shall lose  
 the benefit of his former distresses, he  
 shall be perhaps without remedy for  
 his arrerages of rent. And if the

were of a distresse for rent before and after the Testators death, I conceive, though not so strongly, for most of the reasons abovesaid, that the Law would be all one as in the other case; for though in this case request shall not be had to the Executors losse, upon whose goods the Law esteems this debt, though not the other, yet here the point of losse must fall either upon the Lessor losing his distresse, or upon the other Creditor losing his Specialty or Record, losing wholly or in part his debt. And in respect of his locall tye upon this land and payment of Rent whereto even the fealty of the Lessee, and tenure of the Land bindeth him, & yet I think it is so that the Lessee can doe by entering into bonds or statutes, or having judgements against him can hinder the Lessor or Reversioner from seeking his remedy upon this Leased land for the Rent therefore due, but whether any other creditor shall be a creditor in his Debt. Doubtlesse if in arre to the avowrie for this Rent either before or since the Testators death, the Executor will plead that

Vid. Bro.  
Pledg. 31.

that the Testator was indebted  
thousand pounds, by statute, recog-  
nizance, or judgement, which  
more then all his goods amounte  
unto, it will be no good plea, but  
may be demurred upon. What if he  
plead so much debt of record to the  
Crowne? surely I doubt whether this  
Plea will be allowed in any other  
Court then the Exchequer; yet these  
arreages of Rent shall be levied  
upon the land, so as either the Exe-  
cutor must pay it, or lose the cattle  
distrained by a return irreplevisable  
and then shall not have sufficient to  
satisfie the debt to the Crowne, I doubt  
not how he shall well escape, when  
pursued in the Exchequer, to make  
up this Crowne debt out of his own  
purse, which is hard. For this we  
may pitch upon as a *Maxime* and  
principle, that an Executor, when  
no fault is in him, shall not be bound  
to pay more for his Testator then his  
goods amount unto. Again, it is  
a rule, that where nothing is to be  
had, *viz.* justly to be had, the King  
seeth his right: and our bookes tell us  
That the Kings Prerogative must not

doe wrong, *Potestas ejus juris est, non injuria : nam potestas injuria non est Dei, sed diaboli.* On the other side, it may be said, that if Land leased come to the King by grant, outlawry, or otherwise, the tenant reserved cannot be distrained for, and therefore is it not very unreasonable nor incongruent that the Kings interest for his debt should make the distresse of a subject to stand by and give place. This therefore among other of the Premises doe I give as a *querre* : nor is it altogether unprofitable either for an Executor or Creditor to know what wayes and passages, what cases and continuances be doubtfull and hazardous. And if in these unbeaten paths, where our bookes and relations have held forth no light, expresse, or particular, I have erred in mis-resolving, in missing to resolve, I hope I shall without difficultie obtaine pardon. Now let us consider of assumption or promises made by the Testator upon good consideration, the performance whereof or making recompence and satisfaction for not performing.

So Bracton.

Not resolving.

Q

form-



forming, doth lie upon an Executor as before is shewed. These therefore are to come behinde and give place unto all the former, so as an Executor this way, or for these sued, may pleade debts by Specialty, rent, &c. amounting to the whole goods.

*Co.lib.9.f.88.*

*b.Doff. & Stu.*

*lib.2.cap.10.*

*& 11.*

And yet these debts by contract or assumption expresse are to be satisfied before Legacies be to be had. First, by the common law of the Land those are recoverable, and so are not Legacies: next because, as our bookes speake, it concernes the soule of the Testator to have *as alienum*, all duties and debts to other men satisfied before the debtors voluntary gifts or bequests. Also these debts by assumption or simple contract, are to be satisfied before the reasonable part of the Wife or Children, to which by custome in some Countie they are intituled, See 21. *Edw.* 4. 21. and 2 *Ed.* 4. 13. & 2. *Hen.* 6. 16. And note that in such an Action, upon the case it is not of necessitie to lay or set forth in the Declaration that the Defendant hath Assents to pay all Debts by Specialty, and this also; but there

*Co.lib.9.f.90.b.*  
*Pinchons case,*  
*& fo.94.Banes*  
*case.*

there want, the Defendant must alledge that in his excuse, for else it shall be presumed that he hath Assets. So also in an Action upon the Case grounded upon the Executors owne assumption, to pay his Testators debt: and yet as the Lord Cooke conceives, and upon good reason, as to me it seems, if the Executors so promising had not Assets sufficient in his hands to pay this debt promised, he pleading *non assumpsit*, may give that in evidence, for then the consideration faileth, as also, if there were no such Debt due, since the plaintiffe could not have recovered, if he had sued; and so his forbearance to sue, was no valuable consideration.



## CHAP. XIII.

*Of Devastation or Wasting.*

**T**hat which Saint Paul  
 of dispensers spirituall  
 who are as it were the  
 Executors of the last  
 will and Testament  
 of our Savior Christ  
 doth say or enioyne, *viz.* that they  
 must be found faithfull; The same is  
 required of these lesse or inferior dis-  
 pensers, the Executors of mens  
 Wills, and hereof they are to be re-  
 gardfull, not onely in respect of es-  
 caping damage to their owne estates  
 but more especially in respect of an  
 oath, which divers of our Bookes  
 mention to be taken by Executors  
 And in one of the bookes of relations  
 of cases in the twentieth yeere of  
*Hen. 7.* his time, there is an expresse  
 mention of three things, whereto the Of-  
 fice

office of an Executor tyeth him. First, To doe truly, and thereto are they sworne, saith this Booke. 2. To be diligent, viz. with scedulity to attend the discharge of the trust. 3. To doe lawfully; nor well can this latter be without knowledge what is lawfull, or required by the Law. Now what is formerly said of the right method and order of paiment of debts, discovereth in much part how and by what wayes an Executor may waste and mispend his Testators Goods, and consequently incurre a devastation, and so make his owne goods liable: but of that more fully and particularly by it selfe, and herein wee will consider of these parts.

1. *What shall be said to be a wasting or devasting, and how many wayes that may be done.*
2. *Who shall by this act be charged to yeeld recompence.*
3. *Who shall take the benefit or advantage of it.*
4. *How farre, or in what measure the advantage shall be taken.*

5. *What way, or by what means it shall be had.*

**A**S to the first, this wasting is done divers wayes. First, by the Executor his plaine, palpable, and direct giving, selling, spending, or consuming the Testators goods after his owne Will, leaving debts unpaid. 2. By paying what is not to be paid, which yet is to be understood where there are debts payable and unpaid. 3. By the way formerly discoursed of, *viz.* the not observing the right method and order of Payment. 4. By assenting to a Legatee having a thing bequeathed, debts being unpaid. 5. By selling goods of the Testators at an under value; for be the appraisement what it will, and let him sell for what he will, hee must stand charged to the best and utmost value towards the Creditors. Yet if upon a judgement against the Testator or the Executor, the Sheriff sell some of the Testators goods at an under value, this is no violation of the Executor, for this difference *Hody* chiefe Baron makes

But since an Executor may haply prevent this act of the Sheriffe by paying the due summe, upon sale of the Testators goods at the best value or otherwise, he is to be blamed to leave it to the conscience of the Sheriffe or under Sheriffe rather. Sixtly and lastly, this may be done to the Executors smart by undue, viz. not legall discharging of any debt or duty pertaining to the Testator, and that divers wayes requiring heedfulnesse. As if an Executor upon a bond of two hundred pounds forfeited for payment of a hundred pounds accept the principall, or perhaps also some use, costs, or damage, and give a release or acquittall of the whole forfeited bond, or of all actions, or upon record acknowledge satisfaction upon judgement had. This is a waisting of so much as the penall summe is more then is received, and so far his own goods stand liable to creditors not satisfied; and so doubtlesse is it if he do but give up the bond having no judgement upon it, though he neither make release nor acknowledge satisfaction. But his verball agreement to require

13 E.3. Fitz. 91  
Yet on the other side, if an Exec. by payment of an 100 pounds, get in a forfeited bond of 200. pounds, it shall be an Administration but of 100. pounds, 27. H. 8. 6. p. Fitz. inst.

or sue for no more, or his giving a note of receipt for so much as he hath received, or delivering of the bond into a friends hands, or into a Court of equity in way of security to the debtor that he shall not be sued for more, is no devastation, since still the rest in law remains due and suable. So this lets no more upon the Executors score then he received. But let him take heed of releasing, except he be sure there be no other debts demandable. Nor only is there danger in releasing of debts, but of trespasses or other causes of action also. As if one take away goods from the Testator or from his Executor; If the Executor make his release, this is a devastation, and makes his own goods lyable to the whole value of the goods released, as appears by *Russels case*, where the release of an Infant Executor to one who had taken and committed to his use Jewels and goods of the testator being pleaded, the release was therefore held void in respect of nonage, for that if it should have stood good, it had amounted to a *Devastavit*, and made the Executors own goods lyable

which, his infancy considered, had  
been hard. Another way of dischar-  
ging, dangerous to Executors, is sub-  
mitting matters of debt or duty, or  
touching goods taken away to arbi-  
trament. For if by the award of the  
arbitrators, the debtors or wrong-  
doers be discharged or acquitted  
without making full recompence, the  
loss of the value will as to other cre-  
ditors sit upon the Executors skirts,  
because it was their voluntary act  
to submit it to arbitrators. Thus  
many Executors fall under prejudice,  
not only by wilfull wasting or un-  
lawfull miscarriage, wherein they  
are not to be pittied, but through in-  
diligency and unskilfulnesse also.  
I may say truly, that it is very  
hard for Executors in some cases to  
make safely: For besides that to finde  
out all judgements and recognizances  
for or against their testators, is of some  
difficulty more then for statutes,  
whereof by search in an Office descry-  
ption may be had; yet with this difference,  
that statutes marchant, and statutes  
simple may be and stand effectually a-  
gainst Executors, though not inrolled,  
albeit



albeit against purchasers of the con-  
 fessors land they be not of force, if ne-  
 lect be of inrolement within three  
 moneths. But where statutes or  
 cognizances lye for performance  
 covenants upon sale or lease of land  
 marriage, agreements or otherwise  
 how hard is it for Executors to know  
 whether any covenant be broken or  
 not; how hard to be sure they find  
 out all bonds, bills, covenants, and ar-  
 ticles in writing made and kept by  
 others, whereby any mony is due and  
 payable before debts by contract  
 legacies: as also all promises  
 debts by contract payable before  
 Legacies: For the law hath pre-  
 scribed no time for their claim  
 and demand, and whether some such  
 thing or mean of publication were  
 not fit to be enacted, let the  
 judicious consider. To attaine to the  
 knowledge of the Testators debts,  
 remember that it is by the Lord Brouncker  
 reported, that in King H. the eighth  
 his time, Sir Edmund Knightley being  
 Executor to Sir William Spencer, made  
 Proclamation in certaine Mark-  
 Towns that the creditors should

by a certaine day and claim and  
 give their debts: but he for this was  
 committed to the Fleet and fined. For  
 none may make proclamation  
 with the book, without warrant or  
 authority from the King, except Ma-  
 jors and such like Governours of  
 towns, who by priviledge or cu-  
 stome may so doe. But the dangers  
 are only where there is not sufficient  
 of the Testators goods and chattels  
 by which to satisfie both debts and Legacies.  
 or where there is so, the Executor  
 is not in any such hazard as aforesaid.  
 This descry of danger may breed cau-  
 tion, and *Qui timent cavent & vi-*  
*sent.*

As to the second we shall have in  
 consideration two sorts of persons,  
*viz.* first, His Executors, there being  
 many times divers Executors, and  
 the waste or devastation done but by  
 one. Next his own heires, Executors,  
 and Administrators, *viz.* whether he  
 dying, this act shall fixe upon them  
 the charge and burthen for satisfacti-  
 on, as upon himselve should have lyen  
 in case he had lived.

Touching his companions though  
 al-

altogether make but one Executor yet the misdoing of one shall not charge the rest, nor make their goods liable to recompence: as both appeares by the Booke of entries, and was also held in the time of Henry the seventh, *Anno* 12. of his raigne. Yet of the same opinion were the judges twice in the late Queens time, first in a case between *Walter* and *Stanton*, in the common Plees, and shortly after in the Kings Bench in a case between *Hankeford* and *Metsford* though these two cases be not reported in Print. And surely this stands with rules of reason or justice, that each should beare his own burthen. If it were otherwise, many would decline, and abandon executorships, very dangerous to the most honest, and faithfull, in case they were subjected to wracking by the miscarriage of their Colleagues.

As for the Executors or Administrators of the wasting Executor dying before he have borne the burthen of his mis-doing; I have found contrary opinions even in the late Queens time. For first in the *Exchequer* it was

*Lib. Intr. f. 327.*

*Kelw. rep. fol. 23*

*So 11 H. 6. 38.*

*a. 4. El. Dy. 210.*

*a. the writ so*

*issued against*

*the waster only*

*P. 4. H. 8. rot.*

*303.*

*Tr. 34. Eliz.*

*Pass. 36. Eliz.*

conceived to be as a trespassse dying  
 with the person, as comming within  
 the rule *Actio personalis moritur cum*  
*persona*. But in the said case of *Walter* Mich. 31. & 32.  
*Sutton*, the court of common plees Eliz.  
 of contrary opinion, viz. that this  
 is not escaped by the death of this  
 doer, but the law would pursue Tr. 34. Eliz.  
 Executors or administrators, and  
 upon their backs the burthen of  
 compence or satisfaction; for that  
 the Testator or intestate doing this  
 wrong had made himself to be debtor  
 in the first Testators stead, and there-  
 fore they who represent his person  
 must with his goods make amends,  
 and supply; And this later opinion  
 is something in time after the for-  
 mer. Also between these two times  
 there an opinion in the said Court  
 of Common Plees agreeing in part  
 with this latter: For there a judge- Tr. 34. Eliz.  
 being had against an Executor,  
 and the Sheriffe upon the *Fieri facias*,  
 turning that there were no goods,  
 the Testator in the Executors hands Mich. 32. & 33.  
 and then this Executor dying; A *Scire* Eliz.  
 upon a suggestion of devastation  
 by the said Executor deceased, was a-  
 warded

warded against his Executor, and  
 upon good debate, and shew of a  
*sident* left, and reported by Master  
*nour* in King Henry the eight his time  
 And it was then said to have be  
 cleare, that if a devastation had be  
 returned in the life time of the  
*Wastefull* Executor, his Executor sh  
 should have been charged. All  
 doubt was for that here that was  
 done in his life time, yet at last affir  
 matively (as above is shewed) the resol  
 tion was.

Touching the third point, *viz.*  
 whom the advantage of wasting sh  
 accrue, or who by reason thereof sh  
 charge this wasting Executor. P  
 we the Case that the Testator sto  
 indebted to *A.* by Statute, and to *B.*  
 and *D.* by specialty, not of record,  
 Bond, Bill, &c. and the Executor  
 ving no more in assets then only th  
 hundred pound, and this all being  
 to *D.* he payeth him the whole h  
 dred pound not having any thing  
 to satisfie any of the rest of the Cred  
 tors: hereby wrong is done to none  
*A.* who was a creditor by statute  
 therefore he only shall make this Ex

made, but controlled by a latter  
will, after found and proved, may  
excuse him selfe from being an Executor  
his owne wrong by speciall plea-  
ring, how or in what right hee inter-  
meddled, and traversing his Admini-  
strating in other manner, and that this  
excuse need not, nay may not bee;  
as was held in the time of King Henry  
Sixth and Seventh, for that such  
an amount not to any Administring  
will: and where no Administring at  
all is confessed; such a traverse of not  
administring in other manner is dis-  
count, and not legall. But let us  
go back upon these severall points  
sumpted by the Lord Dyer, and wee  
shall see some cautions necessary  
touching them, and their safe enter-  
tainment, first, as touching the point  
of burying the dead, it must be un-  
doubted to be with some expence of  
the Deceaseds Goods, and so it is ex-  
pressed in the said Book of Henry the  
third his time: else for a man out of  
charity, to lay out his owne money  
in intermeddling with the goods of  
a deceased) to bury a friend, hath  
the colour to involve him: so doing  
in

21. H. 6. 28. 10.

H. 7. 28.

Yet lib. Intra.

322. b. where  
he confessed a-  
bout funerall,  
he traversed  
aliter.

Lib. Intra. 322.

where by let-  
ter ad collig.

Hee traversed;  
Absq. hoc. quod  
& Exec.

21. H. 6. 28.

warded against his Executor, and then upon good debate, and shew of a *Wastefull* left, and reported by Master *Wastefull* in King Henry the eight his time. And it was then said to have been cleared, that if a devastation had been returned in the life time of the *Wastefull* Executor, his Executor should have been charged. All doubt was for that here that was done in his life time, yet at last affirmatively (as above is shewed) the resolution was.

Touching the third point, *viz.* whom the advantage of wasting should accrue, or who by reason thereof should charge this wasting Executor. For we the Case that the Testator stood indebted to *A.* by Statute, and to *B.* and *D.* by specialty; not of record, Bond, Bill, &c. and the Executor having no more in assets then only the hundred pound, and this all being paid to *D.* he payeth him the whole hundred pound not having any thing left to satisfy any of the rest of the Creditors: hereby wrong is done to none but *A.* who was a creditor by statute and therefore he only shall make this Ex-

made, but controlled by a latter  
will, after found and proved, may  
excuse himselfe from being an Executor  
his owne wrong by speciall plea-  
ing, how or in what right hee inter-  
meddled, and traverfing his Admini-  
ftration in other manner, and that this  
traverse need not, nay may not bee;  
as is held in the time of King Henry  
Sixth and Seventh, for that such  
an amount not to any Adminiftring  
will: and where no Adminiftring at  
all is confessed; such a traverse of not  
adminiftring in other manner is dis-  
count, and not legall. But let us  
go back upon these severall points  
as is reported by the Lord Dyer, and wee  
shall fee some cautions necessary  
touching them, and their safe enter-  
tainment, first, as touching the point  
of burying the dead, it must be un-  
doubted to be with some expence of  
the Deceaseds Goods, and so it is ex-  
pressed in the said Book of Henry the  
fourth his time: else for a man out of  
charity, to lay out his owne money  
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& Exec.

21. H. 6. 28.



in an Executorship by wrong: taking the case then, that such person lay out, or expends of the Deceased goods or money upon his funeral heed must be taken touching the measure and proportion: whereabout though I can give no particular, and distinct limmit, yet doubtlesse either meere necessitie, viz. Church duties, &c. or at least decent sutablenesse to his quality, must be the bounds. And herein, to speake as I thinke, this latter must either be utterly excluded, or held within very narrow compasse: for what reason that a Knight, or man of higher quality leaving (though perhaps entailed Lands of good value) yet good not sufficient to pay his debts, should have a hundred pounds or more of that which should satisfie Creditors spent in pompous interring of him for his worship, and reputation? neither overseers may only be excused, for seeking to preserve, and keepe the Testators goods, not in case they expend or dispose thereof. So also for him who is authorized by the Ordinance to collect, for if he sell or dispose

*Lib. Intr. 322.*

8. & 9. *Eliz.*

*Dier. 255, 256.*

He sold blended corne, but there he pleaded not the speciall matter.

of any ( though goods otherwise sub-  
 ject to perishing ) it makes him an  
 Executor by wrong, as was resolved  
 in the late Queens time , notwithstan-  
 ding, that by the Ordinaries Letters,  
 he was expressly directed or warranted  
 so to doe, for it was said, the Ordina-  
 ry himself could not so doe. As for  
 him who Administred by vertue of a  
 Will, after disproved or controlled  
 by a latter, Hee must not doubtlesse  
 stand free, for the goods before Ad-  
 ministred, but either as rightfull or  
 wrongfull Executor, stand lyable to  
 the Creditors. Nor doth every such  
 intermeddling by one, out of all these  
 excuses, and evasions, as would be  
 an Administration, make one an Ex-  
 ecutor by wrong. If one doe but  
 take an horse of the Deceased, and  
 tie him in his House or Stable, this  
 makes him not an Executor, saith  
Ashton a Justice; So of like Acts or  
 intermedlings, as he that delivers to  
 the wife of the deceased her apparrell,  
 at least if it be no more then is conve-  
 nient to her degree. But if she take,  
 or another deliver more then such  
 to her, she or he becomes an Execu-

1 And 2. P. &  
 Ma. Dyer. 105.

11. H. 6. 28.

*Apparrell*

33. H. 6. 31.

1. Eliz. Dy.

166.

S

FOR

*Tr* 37. *Eliz.* by *Fenner* Just. If one doe any such act as puls the property out of the executor, he is become an executor by wrong. If the goods be aliened by fraud, he who takes them after the executors death, is an executor by wrong.

*L. 5. E. 4. 72. a.*

*Tr. 2. Jac. in com. b.*

*acc. lib. 5. 35. & 34.*

cutor by wrong: But now let us come to a difference, where there is a rightfull Executor, and a will by him proved, or administration committed, for there such light acts or intermeddling shall not make one an Executor, but wrong, as where there is no other right to be sued. As if one take goods wrongfully from such a right Executor or administrator; This (though he convert them to his own use) makes him not an Executor by wrong, but trespassor to the rightfull Executor or Administrator, who even for the goods, once Assets in his hands, stand liable to suits of creditors, they being neither lawfully evicted, nor rightly administered: But in case there had been no Executor at that time, or no Will proved nor Administration committed, then such taking of the deceaseds goods into a strange hand had made an Executorship by wrong. And thus was the difference lately solved, as is reported by the Lord *Cooke*, in the case between *Read* and *Carter* in the Common Plees.

Yet this further difference was there held, viz. that although the

be an Executor or Administrator by right, yet if a stranger take upon him to receive debts and make acquittances, or to pay debts claiming to be an Executor, he is sueable as an Executor by this Act: and so also in the late *Queens* time was held by *1 El. D. 166. b.* Justices, as touching the receipt of debts and making acquittances, but the book mentions not whether any other Executor then were, or not. But in the point of bare payment of debts, *Fromick* makes another difference, *viz.* If a stranger do with his own money pay the debts of a friend deceased, and not with the debtors: this is but an act of charity, and makes him not an Executor by wrong; otherwise, if with the debtors money: Yet to this another difference must be added, *viz.* that if he thus *H. 20. 7. 5.* paying with his own money, have taken into his own hands goods of the deceased; then is his payment presumed as by or out of the value of these goods, and so makes him an Executor by wrong. Contrarily, if he have such goods in his hands. And in the point of intermeddling with and

disposing of the testators goods where another Executor is ; this further difference is to be added or understood *viz.* That where the goods so taken never came actually to the Executors hands, but were in a remote place, there this taker becomes Executor. For, as it were mischievous to the Executor if he should by a possession in law cast upon him stand chargeable with these goods in remote place purloyned as assets in his hands ; were it as mischievous to creditors, neither Executor by right, nor the stranger as an Executor by wrong should stand lyable to creditors for them. It is true that the right Executor may sue and recover damages for them, and that so recovered shall be Assets ; but the Creditor hath no means at the Common law to inform him to sue, and perhaps it may be cold suit. And with these additions I think that late resolved difference may stand firm and sound. Yet former times without such difference the taking only and possession of the goods of the deceased, was held to create an Executorship by wrong,

*Bulknep* said in the time of King *Edw.*  
and especially if the act were such  
as removed the property out of the  
right Executor, as Justice *Fennar* 50 *Ed.* 3. f. 9.  
in the late Queens time said, *Teste me-*

*Tr.* 3. *Eliz.*

*How and by what name suit shall be  
against such, and  
the like.*

Touching the second point, *viz.*

In what manner suit shall be a-  
gainst such: First in generall, this u-

2 Point.

rrupting Executor is not in suit to be

*L.* 5. *E.* 4. 72.

istinguished by name from the right

*Co. lib.* 5. 30.

Executor, but to sue generally by the

31 & 33. b.

name of Executor of the last Will and

21 *H.* 6. 8.

Testament of the defunct; and then if

*Co. Lib. Intr.*

he will deny himself so to be, he must

144, but 145. a.

plead, that he neither is executor, nor

in the verdict.

hath administred as Executor: Then

he is called

the Plaintiffe must prove that he hath

Execntor, De

administred in some such or the like

*injuria sua pro-*

ort as aforesaid. And it hath been

*pria,*

ivers times held, that where there is

39 *H.* 6. 45, 46

right Executor, and yet another

21 *H.* 6. 8, 19.

both administer by wrong, it is at the

9 *E.* 4. 14, 15.

lection of Creditors either to sue

1 & 2. *P. & M.*

*Dy.* 165. 33. *H.*

6. 38.

35 H. 6. 31.

2 R. 3. 20.

them joyntly together, or one or both of them severally and by himself. But if where administration is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such as receiveth that power from the Ordinary can so be; therefore in that case there is a necessity of suing him apart and by himselfe (who so usurpeth administration) by the name of an Executor. So if *A.* administer the goods of *B.* not being Executor nor administrator, and after his such doing and disposing of the goods he obtaineth Administration of the goods of *B.* but the goods left or coming to his hands since the Administration committed, suffice not without the other debts received or released, or goods sold before, to satisfie creditors. Now if any sue *A.* by the name of administrator, he shall have no further reliefe then according to the value or extent of the goods left in or come into his hands since the

admi-

Administration committed, and if those be fully Administred, hee shall get nothing. If they remaine unadministred, but amount not fully to his debt, he must want so much of satisfaction. And if he will be releevd or satisfied out of the goods before disposed of, he must sue *A.* as Executor of *B.*: and so was it ruled and resolved by *Gawdy* and *Suit*, Justices in the Kings Bench, in the late *Queens* time, *viz. Tr. 30. Eliz.* And if this now administrator will plead in abatement of this Action, that administration was committed to him, and demand judgement, if suit shall be against him, as Executor. Then the Plaintiffe must in this replication, as I take it, set forth the speciall matter, *viz.* how the Defendant did Administer before administration to him committed. That if one to whom Administration is committed, doe devast, and this administration is by suite repealed, because he was not the next of kinne, and Administration is committed to another; now a Creditor, who should be relieved out of the goods devasted, must sue that first as Admini-

21 H.68. If the Administration were committed before the suit began, the writ shall abate, else not, as was of old conceived.



strator, and not as Executor of his owne wrong, said *Popham* Chiefe Justice, for he did rightfully Administred for that time.

**3 Point.**

How farre liable to Creditors.

Yet hee must looke to his plea, else by it he may draw all sued for, upon himselfe, as if he denie his being Executor or Administrator.

*Co. lib. Intr. 144.*

*145. Plus de hoc.*

As for the third, viz. how farre this Executor of his owne wrong, becomes lyable and obnoxious to suite consider we these things; First, he becomes subject both to the Action of the Executor, who hath right in the goods wrongfully intermeddled withall by him, though it were before proving of the Will, and also to the Action of the Creditor, who hath right to the satisfaction of his debt. Secondly, as touching the measure how farre hee is ingaged doubtlesse he is not by his wrongfull Administring become chargeable with the whole account of the Testators debts, but only so farre, as with so much thereof, as the goods which he so wrongfully Administred amount unto, and this seems to be proved by the case in the time of *Ed. 4.* the Third, where the inquest found not onely the Administring and intermeddling by the Executor wrongfully, but found also by

tion of the Court (as it seemeth)  
 that the value was of the Goods so  
 wrongfully Administred, which had  
 been materiall, if the Admini-  
 string of a peny had made one as farre  
 chargeable as the Administring of a  
 pound. 2 Besides, if it be so, that a  
 wrongfull Executor wasting goods of  
 the Testator, to the value of twenty  
 pounds, shall be no further charged  
 on that value; then doubtlesse so  
 shall it be also in this case, for both  
 wrongfull Administrators: only  
 this difference there is between them,  
 that in one case the Administration is  
 by a wrong Person, and in the other  
 in a wrong manner. Nay, the  
 Lord Dyer doth not stick to call him,  
 who Administred wrongfully, or in  
 a wrong manner, expressly an Execu-  
 tor by wrong, in the case of *Stokes a-  
 gainst Porter*, though he were right-  
 fully Executor, because hee did dis-  
 pose or execute wrongfully.

As to the fourth, viz. what Acts  
 done to him, or by him who is an Ex-  
 ecutor of his owne wrong, shall stand  
 as lawfull and good, as done by, or to the  
 right Executor. Suppose, first, that  
 the

1 Eliz. Dy. 167  
 cap. 12.

4. Point.  
 What Acts of  
 his of force.

M. 4. 41. Eliz.  
Co. lib. 5. f. 30.

the deceased were indebted to him twenty pounds, who thus usurpeth Executorship, whether may he pay himselfe or not? And this point was in debate in the Kings Bench between *Coulter* and one *Ireland*, Executor of *Hunt*, where it was strongly objected, that notwithstanding the rightfull Executor or Administrator might punish him, and recover against him for the goods which he Administreth, yet another Creditor suing him as Executor generally, and so affirming him to be & for there is no special forme of Writ or Declaration to distinguish an Executor by wrong from a rightfull Executor ) he standeth as against him in the state of a rightfull Executor, and therefore may first pay himselfe before hee pay others, and of that minde at the first were *Fenner* and *Gawdy*, Justices, yet did they admit that this payment should not stand good, as against the rightfull Executor or Administrator. And *Popham* and *Clinche* held strongly, that neither should it stand good against other Creditors, for then every man would rush upon the Testa-

no speciall  
form of writ  
or Declaration  
to distinguish  
from a Right  
ful Executor

goods, and be his owne carver in  
 payment: And whereas it was said at  
 barre, that the Lord *Anderson* up-  
 on evidence at *Guild-Hall*, had ru-  
 led otherwise, *Popham* at another  
 of debate of the said case, related  
 the Lord *Anderson* did denie that  
 ever so ruled, or was of that opi-  
 nion; and further informed, that both  
 Justice *Walmesly*, *Periam* and  
*Keble*, Barons, did agree with *Pop-*  
*ham* and *Clinche* in opinion. After  
 which, Justice *Gawdy*, as also *Fenner*,  
 did mistake not, changing their opi-  
 nions, and concurring with the rest,  
 judgement was given accordingly. In  
 the debate of this case, question was  
 made if such an Executor by wrong  
 pay a debt to another Creditor by  
 specialty, whether this shall not stand  
 firme and good, since he stands lyable  
 to all Creditors so farre as the goods by  
 him Administred doe amount, and it  
 was agreed by the better opinion, at  
 last that this should stand firme and  
 good, so as if the payment were out  
 of his owne goods, hee might retaine  
 himselfe in liew thereof, so much of  
 the goods of the Testator, for here he  
 doth

*Dobts p'd  
 by wrongfull  
 ex. good  
 ag. any of  
 y<sup>e</sup> laws  
 Nature -*

doth not, as in the other case, advantage himselfe by his owne wrong. That opinion allowing this payment to creditors, must, as I thinke, be understood with this difference, that this payment shall stand against other Creditors, but not against the right Executor or Administrator, for then any stranger might surpe the Office of Executor, and take from him that libertie and election to preferre which Creditor he will in first payment; yea, might take from him the Executors power, to pay himselfe before others, in case there were debt due to him, which were very unreasonable.

*Of addition and alteration by the  
statute 43. Elizabeth.  
cap. 8.*

5 *Point.*

**W**Ee having considered what the Common Law is, and willeth in the premises: Let us see what alteration or addition a statute hath made. In the last Parliament of the late Queene Elizabeth consideration being had of subtrill

into mens hands goods of an in-  
 state by deed of gift, or Letter of  
 attorney, from one of small, or no a-  
 ccount, to whom such subtil contri-  
 vances hath procured Administration to  
 be committed, and so him selfe would  
 be free from the suite of Creditors,  
 Administrator him selfe either not  
 being to be found, or not being of  
 sufficient value to satisfie Creditors. It  
 was therefore enacted, That every  
 person, receiving or having any  
 goods or debts of any intestate, or  
 Release or Discharge of any debt  
 or duty belonging to him upon any  
 will as aforesaid, or without confi-  
 rmation of or neere the value (except  
 satisfaction of some just, and prin-  
 cipall debt, to the value of the goods  
 and debts due from the intestate) shall  
 be charged as Executor of his owne  
 will, so farre as the value of those  
 goods, and debts amount; deducting  
 principall just debts to him due,  
 and all payments by him made, which  
 a lawfull Executor ought to have  
 paid. Here haue wee a touch of all  
 the parts precedent, or at least three of  
 them.

1. Wee have first a new Executor by wrong, though intermeddling under the title of an Administrator.

2. We have a limit of the charge by him incurred suitable to our former expression.

3. Lastly, wee have to him allowance of debts owing to himself or duly paid to others, which is more than we have conceived allowable another Executor by wrong.



## CHAP. XV.

*Of Pleas by Executors, and which best, which most prejudiciall to them.*

**S**INCE amidst the Pleas pleaded by Executors, there is some difference, as that some induce one kind of judgement, some another, some drawing more

burthen upon Executors then o-  
 : Let us consider of the diffe-  
 res, so as light may be taken to  
 pose the safest or fittest for each

If an Executor doe utterly estrange  
 selfe from the Executorship; say-  
 that he was never Executor nor  
 Administred as Executor ( for  
 must be added ) then if issue bee  
 en upon this plea, and it be found  
 inist him, the plaintiffes shall have  
 judgement to recover not dammages  
 ly, but even the debt it selfe out  
 the proper goods of the Executor,  
 none of the Testators can be found  
 satisfie it. And this shall be thus,  
 onely where it is found that the  
 defendant was made Executor by the  
 Will, and proved it, and so could  
 choose, but know it; but even  
 so where he had never proved the  
 Will wherof he was made Executor,  
 or ever administred by vertue there-  
 of; yea though he did before the Or-  
 dinary refuse to bee Executor of this  
 Will, or to intermeddle with the exe-  
 cution thereof; yet if any other na-  
 med Executor with him did prove the  
 Will

Plea, denying  
 the Executor-  
 ship.

21 H. 6. 19, 20.  
 Bro. 62.

2 E. 4. f. 4. 1. 9.  
 H. 7. 15.

Lib. Intr. 322.

333. 33. H. 6

33. 34

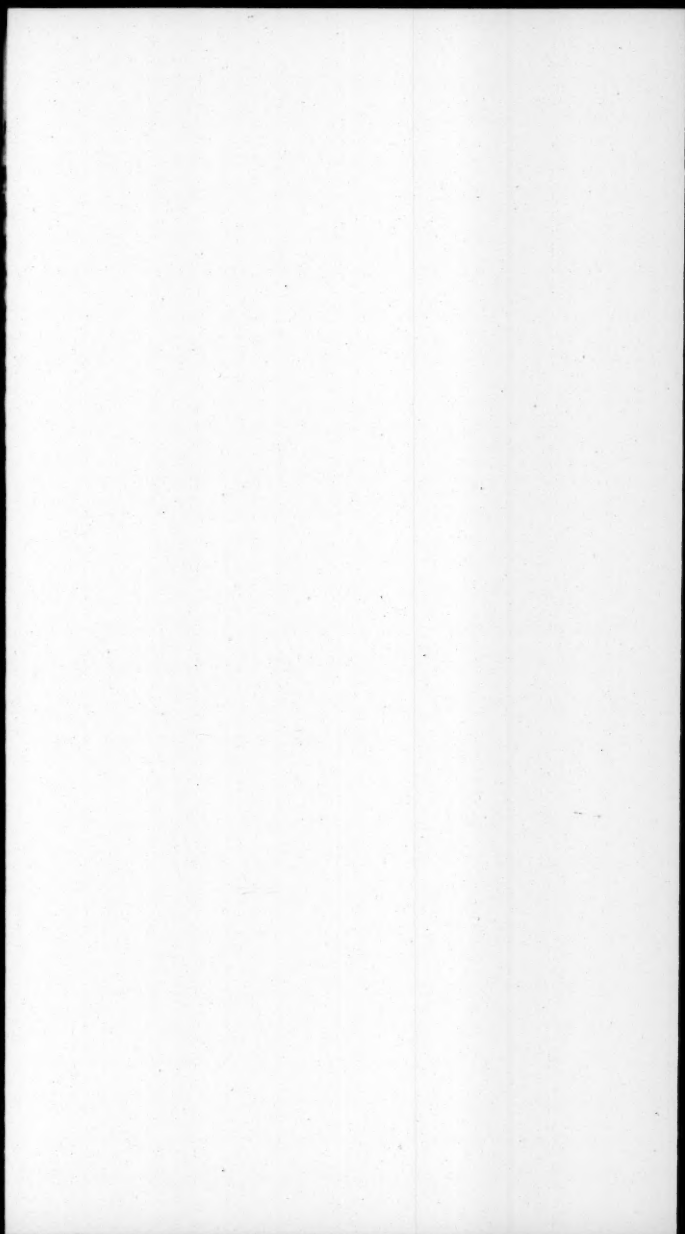


Will, or did not refuse to be Executor, let such other refuser take of pleading that plea. For truly against the first part of his plea, that he never was Executor; and the verdict which must be *verdictum*, must needs passe against him and make his own goods liable as to debt as dammages. What if he then were made Executor but this ly who refused before the Ordinance may he safely plead that he never Executor? I think not, since he so Executor before his refusall, then might have released all debts due to the Testator, and given away all goods, therefore I think he must specially shewing his refusall, not generally deny his being Executor.

He was suable  
as soon as the  
Testator was  
dead.

But if he did it  
as Adm. it is  
otherwise yet  
see that special-  
ly pleaded *Co.*  
*Lib. Intr. 148. a.*

Nay admit he never was once med, made or intended to be Executor, yet having pleaded Plea, that he never was Executor administered as Executor, if it be found by verdict that he did Administer or intermeddle as Executor same blow or burthen falleth him, for then the latter part of



a.  
Plea is for  
upon the  
ring he  
owne w  
executo  
shall l  
all of a  
ke Law  
release  
ent of  
ance of  
lie. N  
e judg  
ainst the  
er, for  
executo  
aw mak  
or, is,  
le, bu  
ilfull,  
owne  
lly, fo  
d pro  
Barre  
dant;  
en a B  
uth E  
if the  
afe ma

Plea is found untrue, yea the whole  
upon the matter, for by his Admini-  
strating he became an Executor of his  
own wrong, and the deniall of this  
Executorship by wrong or usurpati-  
on shall be as penall to him, as the de-  
niall of a rightfull Executorship. The

Law where the Executor pleades  
release made to himself, or a pay-  
ment of the debt, or other perfor-  
mance of the condition made by him-

self. Nay, I finde in this latter case,  
the judgement entred generally a-  
gainst the Defendant, as against ano-  
ther, for his owne debt, not being  
Executor. And the reason why the  
Law makes these so penall to an Exe-  
cutor, is, because his Plea is not only  
false, but the falshood thereof was  
manifest, since it must of necessitie be  
knowne to himselfe to be so. And

for that all these Pleas, if they  
proved true, had been perpetu-  
all Barres at least against the De-  
fendant; the first indeed had not  
been a Barre against another being in  
such Executor or Administrator.  
if the Executor had pleaded a re-  
lease made to his Testator, finding

T such

See Co. Lib.  
Intr. Judgm.  
so entred. fol.  
145. b. Read  
& Carters  
case.

Co. Lib. Intr.  
29. a. not first  
de bonis testa-  
toris si, &c.  
See Bro. Ex. 22.  
these reasons  
for this diff.

33 H. 6. 23, 24.

So of other  
perform. Co.

*Lib. Intr.* 133. a.

6 E. 4. 1. 7. E. 4.

8. See *Bro. Ex-*

*c.* 22. that the

Book contrari-

ly reported 34.

*H. 6. 22, 23.* is

erroneous, as

was descryed

by *Fitz. & Al.*

23. *H. 8.* the

Record being

not so as the

Booke saith

the judgement

was.

such an one among his writings  
which yet was either forged, or never  
both sealed and delivered by the  
plaintiffe as his Deed; or if he plea  
payment made by his Testator, nei-  
ther of these Pleas found against him  
shall cause the judgement to fasten  
upon his own goods; so if he denies  
the Bond or Bill, whereupon the suit  
is grounded, to be the testators Deed.  
For in all these cases the truth being  
not knowne to him, he might honest-  
ly and reasonably conceive it to be  
he did plead. But what if he pleads  
Fully administred, and this be found  
against him, which rested in his own  
knowledge; shall not this false Plea  
expose his own goods in defect of his  
Testators, to the satisfaction of the  
debt? no, it shall not; for that though  
this were a false plea, and that with  
his own knowledge, yet was it not a  
perpetuall barre: for if it had been  
so found as was pleaded, yet after  
comming after to the hand of the Ex-  
ecutor, the Plaintiffe should have  
have reliefe and satisfaction out of  
these since accrued assets. If any as-  
sets how assets may after come. I will

give him two or three instances. First, it may be by recovery of debts before withhelden, or of damages for goods taken away, or by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the Testator having a lease for twenty yeers, did demise the same to *I. S.* for the whole terme, if he so long should live, if he were alive in time of the former verdict, but now is dead, the terme continuing, this is now Assers, which before was not, whilst it was but a possibilitie of terme. Other instances might be given, but these may suffice. If the Executor pleaded, that the Testator was bound in such a Statute, or that there was such a judgement against him of debt to the King, beyond the satisfaction whereof the goods would not reach: This is in effect, a fully admitted, though speciall, and not generall, and the Law is alike (as I have shewed) in all these cases, as to the taking of the Executors goods lyable to the debt. But in all these causes, though the debt shall not be adjudged upon the Executors owne goods, yet the

*Lib. Intr.* 148.

149. This good though the judg. were by *non sum inform.* and no averment that it was without covin.

*Co. Lib. Intr.* 152.

11 H. 4. 5.

There a *cap. ad sat.* was awarded for the Damages.

damages shall, in default of the Executors goods to satisfie them. And in these cases, it is not materiall whether the judgement passed upon trial or demurrer. Nay if the Defendant Executor plead no plea, but confesse the action generall, or be condemned by *Non sum informatus*, the judgement is the same, viz. to record the debt only out of the Testators goods and the dammages of the Executor goods in default of the Testators what if the Executor Defendant confesse that he have Affets to the value of part of the debt, not of the whole there, for so much as is confessed the Plaintiffe may pray, and have judgement presently without dammages and may maintaine for the residue of the debt that the Defendant also have Affets for the rest, and so goe to trial as appeares both by the Printed Book of entries, and another Manuscript which I have; but what if this trial passe against the Plaintiffe? shall he then have an aditionall judgement for dammages, in respect of the former? I thinke he shall have costs which commonly run, with or in the

But he may I think forbear so to doe, and to the judgement, for part, adde, that when more Affets come, he shall have more.

*Lib. Intracion.*  
*fol. 223.*

same of dammages, but without a Writ to enquire of dammages, none being found by Verdicts, the Court doth not usually adjudge dammages: *Fol. 542.*  
 yet in the Book of entries I finde 6<sup>s</sup>.  
 dammages assessed by the Court, upon a confession in a Writ of *Ratio-*  
*ab. parte honorum* against Executors, and this hath much affinitie with the action of debt. Yea, in the very Action of debt, where the *Jurors* for miscarriage, after their departure from the Barre, were fined, I finde that the Plaintiffe renouncing the assessment of dammages by them made; and praying the Court to assess the same, *M. 28. H. 6. Ro. a. 321.*  
 it was done accordingly, but this was *Lib. Intr. 329. a.*  
 a speciall case.

Whereas we before shewed that an Executor denying his Executorship, shall, if it be found against him, pay the debt of his owne goods for his false plea; This thereabout occurreth to be added, *viz.* that that is only where the immediate Executorship of the Defendant is denied. For if *B.* be made Executor by *A.* and *B.* dying, makes *C.* his Executor; now if *C.* be sued for the debt of *A.* as Executor



See Lib Intr.  
322.

of *B.* Executor of *A.* and he denyeth that *B.* was Executor of *A.* which by consequence, is a deniall of his being now Executor of *A.* yet if this fall out in triall against him, he shall not in his owne goods stand liable to this debt; because it is possible that he might not know to whom his Testator was Executor. So if *A.* made *B.* *C.* and *D.* his Executors, and *E.* is sued as Executor of *D.* the surviving Executor of *A.* if *E.* denie that *D.* his Testator survived *B.* and *C.* by consequence whereof he denieth the truth, viz. that the Executorship of *A.* is devolved to him, yet shall not this found against him, charge his owne goods, for hee might be ignorant of this point in fact, viz. Whether *B.* *C.* or *D.* lived longest. And here he denied not his own immediate Executorship, but a mediate or more remote Executorship; and so I think is the Law where *C.* being sued as Executor of *B.* Executor of *A.* he pleades, that *A.* by a latter Testament, made himselfe Executor, which is found against him, so as here he falsely pleaded, and pretended himself to be the immediate

Execu-

Executor of *A.* and so denied the mediate Executorship, *viz.* of *B.* to *A.* and of him to *B.* yet *Quare* of this, for why should not as well his false making himselfe an Executor immediate to the indebted Testator, charge his owne goods, as well as his false denying of that Executorship; since both Pleas tend to the overthrow of the Plaintiffes action, and each equally rested in the Defendants knowledge. But this difference is between them apparant, *viz.* that the deniall of Executorship, if true, is an utter, and perpetuall Bar to the Plaintiffe, as against him so pleading; but the affirming of an immediate Executorship, where he was sued as Executor immediate, doth not so, if true, but directs the Plaintiffe to a better writ or action, *viz.* against him as immediate Executor to the indebted Testator.

Where wee have before touched upon the comming of Assets futurely to Executors, I thinke it not amisse to consider a little the forme and frame usuall in Pleas of fully Administred, which thus runne, *viz.* *Quod* *die impetr. & plene Administravit omnia* Lib. Intr. 151.

*bona & catalla que fuerunt præd. S. temp. mortis sue, & nihil hab. de bonis &c. que fuer. præd. S. temp. mortis, &c.*

7 H. 4. 34. Bro.  
50. This plea is  
not good per  
cur. because  
some may have  
since accrued.

Thus tying his deniall upon the things which were the Testators at the time of his death. What if then the Executor have, at the time of this Plea pleaded, goods which were not the Testators at his death, but since accrued as before is shewed, or perhaps a lease for years sold by the Testator upon condition to be void, if five hundred pounds not paid at such a day, which happening after the Testators death and default made, the terme returneth; Or if the Executor by a Writ of error reverse a judgement given against his Testator for two hundred pounds, and so is restored thereunto? May the Plainiffe now reply generally that he had no assets which were the Testators at the time of his death? How can the Jury so find, when the truth is not so? Surely this case is not common, nor can it shew a president of a speciall plea therein. But in reason me thinks it should be specially and not generally pleaded and set forth in the replication.

And in case where one sued  
 executor denyeth that he was ever  
 executor or Administred as Execu-  
 tor, I finde sometimes the repli-  
 cation generall that he did Admini-  
 ster, without shewing wherein or how:  
 and sometimes speciall, shewing what  
 thing was Administred and where.  
 We note, that the Executor De-  
 fendant denying (as he must) two things  
 First, that he never was Executor,  
 Secondly, That he never Administred  
 as Executor, the Plaintiffe in his repli-  
 cation is tyed to maintaine, but the  
 truth of them as the truth of the case is;  
 that is, if in truth the Defendant were  
 made Executor, but never did Ad-  
 minister, now it must be replied that  
 he was made Executor at such a place,  
 without speaking any thing of his  
 administering. On the other side if  
 he did Administer, but were not made  
 Executor, then only the administering  
 is to be replied; but if it shall be  
 found that the defendant had admini-  
 stration to him committed and so ad-  
 ministred by vertue thereof, then is  
 the verdict to passe for the defendant,  
 for this is no administering as Execu-  
 tor,

*Lib. Intrac. 322*  
*a.b. but a place*  
*must be shew'd*  
*So 21 H.6. 19,*  
*20. Bro. 62.*

*So done Co. lib.*  
*Intr. 144. 4.*

tor, and upon a generall denyall thereof this may be given in evidence, the *Lord Dyer* reports to have been resolved. But if the Plaintiffe doe his replication maintaine both points, shall this make his plea double. Me thinks it should, yet I finde it replied, and no exception taken for the doubleness. *Tr. 17. H. Rot. 28.*

*Mich. 13. & 14*

*Eliz Dy. 305.*

*Lib. intr. 322. b.*

*Tr. 37. Eliz.*

A sole woman being Executor maketh a deed of gift of the Testators goods in trust, but continueth possession of them and marrieth *T.S.* who also hath possession of the Goods, and in an action of debt by a creditor fully administred is pleaded: now upon evidence the verdict shall passe for the Plaintiffe; for this alienation being fraudulent was void as to all creditors, and so as to the Plaintiffe the goods continued the Testators, and affets in the defendants hands, as was held in the Kings Bench. If fully administred be pleaded where the defendant hath affets for part but not sufficient for all, and so is it found yet shall not judgement be given for the whole, but for part presently

with

a further award, that when  
 shall come to the Executors  
 the Plaintiffe shall then have  
 her judgement for the rest, so as  
 a false plea doth him no prejudice,  
 makes him in as good state, the  
 charges of triall all excepted, as if he  
 confessed himselfe to have part.  
 I thinke the plaintiffe upon that  
 confession of part may pray the like  
 judgement without maintaining that  
 Defendant hath sufficient for the  
 rest; for if that be not true, why  
 should hee be put to the charge of a  
 trial by Jury: yea Sir *Edm. Cooke* at  
*Barre Tr. 36. Eliz.* said, that where  
 a debt is administred is pleaded, the  
 plaintiffe is not tyed to maintaine the  
 contrary, but may presently pray and  
 have judgement to recover it, when  
 the rest shall futurely come to the De-  
 fendants hands, which was denyed  
 some; but truly me thinks the law  
 should be as he said, as well as in the  
 former case, where for the part which  
 the Defendant had not affets to pay, it  
 was done upon verdict so finding.  
 there, as I conceive, it was not a  
 present judgement, but an award that  
 he

Yet *Finch. 46.*  
*E. 3. f. 9, 10.* held  
 the contrary,  
*viz.* that judge-  
 ment should be  
 of the whole,  
 but execution  
 only for so  
 much, & a *Sci.*  
*fue.* for the rest  
 when more af-  
 fets.

See *Co. lib. 8. f.*  
 134.

he should have judgement futuramente; as after when assets come to the defendants hands, the Plaintiffe must have *Scire facias* against the defendant, to shew cause, not why he should not have execution, but why he should not have judgement, as I take it; yea where it is found for the defendant, that he hath fully administred, yet was it held by all the Justices, 33. Hen. 6. 23, 24. and by *Prisot* 34. Hen. 6. 24. the when assets after come to his hands the Plaintiffe shall have a *Scire facias* to have satisfaction out of them, but there *Markham*, *Telverton*, and *Forscote*, were of the contrary opinion and so was the whole Court, 4 Hen. 6. f. 4. and it stands with great reason, that where upon a verdict fully found against the Plaintiffe judgement is given *quod nihil capiat per breve*, there he cannot have any writ to execute the judgement for him, but is put to a new action of debt; yet where it is found that the Defendant hath assets for part of the debt, but not sufficient for the whole there it is very congruous that the Plaintiffe have presently judgement for

So 19 H. 6. f. 37  
3. E. 4. f. 24. See  
judgement so  
entred. *Co. lib.*  
*Intr.* 151. b.

or part, and after when more com-  
 meth, then by *Scire facias* against the  
 defendant obtaine judgement & exe-  
 cution for the rest; for here both verdict  
 and judgement were for the Plaintiffe  
 against the Defendant, whose plea,  
 that he had no goods, was false, and so *So 7 E. 4. f. 9.*  
 found by the jury. And this difference  
 was strongly avowed by Serjeant  
*Manham Mich. 33, 34. Eliz.* and after  
 approved by *Fenner Just. 36. Eliz.* none  
 contradicting it, yet a booke was ci-  
 ted that the plaintiffe recovering so  
 much as was found found in the Exe-  
 cutors hands should be amerced for *It is 21 H. 6.*  
 the residue, which *Popham Chiefe* *40, 41.*  
*Justice* denied to be law.





## C H A P. XVI.

*Where judgement shall be against  
Executors own goods, though  
plea of the Defendant nor vastation  
doe so occasion, and of the severall  
manners of judgement in severall  
cases.*



**H**ow by wasting, calling  
by us commonly,  
*Devastavit*, an Ex-  
ecutor may draw  
down the Execution  
upon his own goods  
hath formerly beene handled and  
coursed of, as also what kinde of plea  
doe make the Executors own goods  
liable to the debt, and what not.  
Now let us see where without mis-  
ministring or mis-pleading, yet the  
nature of the action shall lay the  
whole debt or thing recovered upon

the Executors own goods. And this  
 shall finde in some few cases, first,  
 Where an Executor is sued for rent  
 behinde after his Testators death, up-  
 on a lease for yeers, made to the Te-  
 stator, and by him left to his Execu-  
 tor. Here it shall be adjudged and  
 tried upon his own goods, for that  
 so much of the profits as the rent a-  
 mounted to, shall be accounted as his  
 own goods, and not his Testators,  
 therefore is he to be sued as well in  
 the *debet* as the *detinet*, where in other  
 cases he is not, but in the *detinet* onely  
 being sued as Executor. So if any  
 thing delivered to, or detained by his  
 Testator come to his hands, and he still  
 retains the same after the demand,  
 and be thereupon sued in an action of  
 detinue; for this is his own act: nor  
 in this case need he to be named as ex-  
 ecutor, for he shall not answer dama-  
 ges for his testators detaining. So if he  
 come to pay a debt of his Testators  
 owing assets, and be sued upon this  
*assumpsit*. the which debt is to be recou-  
 red in damages, and that upon,  
 out of the Executors owne goods,  
 is this action, and the assumption,  
 which

5: *Marie fol.*  
182.

*Reade and Nor-*  
*woods case.*

*Co.lib.Intr.fo.1,*  
2.

which is the ground thereof, founded in the Executorship, and his having Assets; for if either hee had not been Executor, or if hee had not Assets at the time of the promise, it had been *nudum pactum*, and would not have bound him, nor given good cause of suit. Nay to goe further, in the case of assumption by the Testator, and suite against the Executor, thereupon we finde the judgement in Mr. *Plovers* Commentary given against the Executor generally, as if he had not been an Executor, not fixing it upon the Testators goods, yet there the very debt it selfe is included in the damages. But contrarily was it after, the seventh yeere of the late King *viz.* judgement given, that as were the damages, as the costs should be levied of the Testators goods, if so much in value of them were in the Defendants hands; and if not, that the costs only of the goods of the Executor. And this surely is the right and more just way, for there is no reason, that upon a promise, more than upon a bond, the law should cast the whole debt upon the back and state of

Executor. But perhaps the two  
 judgements may be reconciled thus,  
 the latter was given upon a verdict,  
*assumpsit* being the issue, and  
 the jury assessed dammages in  
 certain, viz. two hundred fifty three  
 pounds with the costs. So as here the  
 judgement was compleate and full,  
 to recover the said summe, but  
 in the other case the judgement was  
 upon a demurrer, so as the dam-  
 mages not being known, it was ge-  
 nerally that the plaintiffe should re-  
 cover his dammages against the De-  
 fendant. *Sed quia nescitur quae dam-*  
*ni, &c.* because it appeareth not to  
 the Court what the dammages were,  
 therefore a Writ was awarded to  
 inquire of dammages, upon the re-  
 turn whereof, executed, the judge-  
 ment was fully and compleatly to be  
 given of a summe in certaine, which  
 second judgement it appeares not by  
 the booke in what manner it was en-  
 ded, and therefore might perhaps  
 be then agreeable with the other. And  
 that the said first judgement be-  
 fore the dammages inquired of, is not a ple-  
 a and full judgement: but an award

*Writ of enquiry*  
*Pl. m. 397.*

*Tr. 30. Eliz.  
Pasc. 33. Eliz.  
in com. banc.*

of judgement hath been divers times resolved, and that therefore any defect and insufficiency in the declaration may be shewed time enough after the first, and before the second judgement. Yea if the plaintiffe dye before the second judgement, though after the first, the action falleth to the ground. So if the defendant die: otherwise of death after full judgement. But this notwithstanding, and howsoever there were done upon the second judgement, me thinks it were right and fitter that the first judgement should expresse that the damage should be had and levied out of the Testators goods, for whom and in whose right the Executor is sued.

So for rent behind since the testators death.  
*Co. lib. 5. f. 31.*  
the suit is in the *debet* as for his own debt.  
*M. 14. & 15. Eliz.*

Another case there is wherein the judgement must be, as it seemes, against the Executors own goods, viz. in an action of covenant for a breach of covenant since the Testators death for so was it held both by all the Judges of Common Pleas, except the Lord Dyer, and by the Prentises in the late *Queens* time, where the case was of an house upon the lease negligently burned in the Executor

time, for which dammages only were  
 to be recovered. And sometimes  
 where the Executor himselfe is so to  
 beare the burthen, I finde the judge-  
 ment entred that the summe recovered  
 shall be levied of the lands and goods  
 of the Executor.

*Lib. Intr. 329 a-  
 & b. De terris  
 & catallis, &c.*



## CHAP. XVII.

*Of Women Covert, Executors.*



Here being two kind  
 of persons who have  
 some disability up-  
 on them, viz. Fem-  
 me coverts or mar-  
 ried women and In-  
 fants, touching whom we finde in ma-  
 ny places question and disceptation  
 in our bookes : We will consider of  
 them by themselves, or apart from o-  
 thers, yet not joyning them together  
 together, but each by himselfe sepa-  
 rately.

First therefore of *Femme Coverts*, touching whom we will consider these three things.

*First, whether they may make Wills and Executors, with or without their husbands assent, and how whereof, and in what cases.*

*Secondly, whether they may be made Executors without their husbands assent, or how their husbands may hinder it.*

*Thirdly, what acts in execution of the Executorship they may doe without their husbands, or their husbands without them.*

• Sect. I.

*Sola & secreta  
examinata.*

**A** Woman married, or *femme Covert*, we know is *Sub potestate viri, cui in vita contradicere non potest*, as saith the Writ given by the Law to the Wife for the recovery of her lands after her husbands death, being assigned by him. Therefore it is the Judges, when a woman is to acknowledge a fine of any Land, doe examine her apart from her husband, to know whether shee be willing, or come doe it by the compulsion of her husband.

band: It is therefore hard for her to have freedom of will, and consequently freedom to make a Will. Besides, all her moveables or goods personall, which she had at the time of her marriage, otherwise than as executrix or administratrix, are by the Law totally devested out of her, and setled in the husband as fully *ipse facto* upon the very marriage, as any other that were his own before: Of these therefore she can make no disposition, no more than of other her husbands goods: But in case she doe by Will bequeath them, although the Will and gift be void, yet if the husband, as the case was in the time of Edward the second, doe after his wives death consent to this her Will and Gift, by delivering of the goods bequeathed after her death, or assenting that the legatee take them by vertue of such Will and Gift; this amounteth to a new gift by the husband. If a woman have a lease, an estate by extent, a wardship, the next avoydance of a Church, or other Chattell reall; these are not devested out of her into her husband by marriage, but in case she

Debts except which are not properly good.

5 Ed. 2. Fitz. devise. 24.



over-live him, they continue to be as before, no alienation or alteration having been made by the husband who had power to dispose of them by gift in his life-time, though not by his will; yet such a woman in her husband's life-time could not of or for these things, without her husband's assent, make an Executor or Will, but she dying before him, they would, by the operation of law, accrue to him. And here then observe a case, though not frequent, yet full of mischief when it happens: Suppose that a woman indebted a thousand pounds, and having given leases and moveable goods to the value of three thousand or four thousand pounds, marryeth with I. S. and then dyeth before the debt be recovered against her: in this case the husband shall have, and goe away with all this value of his wife, and is not lawfully able to pay one peny of her debts, because he is neither her Executor nor Administrator: What the Chancellor could doe, or rather what the Lord Chancellor, or Lord Keeper would doe in this case, I will not take upon mee to say or determine.

During her life he is, but not after.

another sort or kinde of goods, or  
 other interests a woman may have,  
 debts or things in action, which  
 the former are not devested out of  
 by marriage into her husband, nor  
 can she thereof make an Executor  
 without her husbands assent, although  
 they be one degree farther from the  
 husband than the said Chattels reals,  
 that though the husband doe o-  
 verlive the wife, he shall not be intitled  
 to them as to the former : But if his  
 wife make him Executor, as she may,  
 if after her death he take admini-  
 stration of her goods, then as he is  
 thereby intitled to them, so is he ly-  
 able also to pay her debts out of the  
 same, when he shall have received them.

But the hus-  
 band may re-  
 ceive them, or  
 release them.

Lastly, *Dato*, that a woman Covert  
 Executrix to some other person,  
 and in that right hath goods movea-  
 ble; these are not devested out of  
 her, because she hath them not meer-  
 ly to her own use, but as representing  
 the person of another : but whether  
 she may shee without her husbands  
 licence or assent, in respect of her be-  
 ing an Executor, and for continuati-  
 on of this Executorship make Execu-

12 H.7.f. 22.  
 The husband  
 was sued in  
 Spirit. Court  
 as Executor to  
 his wife.

So shee is often  
 to former hus-  
 band, and to fa-  
 ther, &c.

39 H. 6. f. 27.

34 H. 8. S. Bro.  
Testaments: 218 El. 4 f. 11.  
Vaasor Inst.

tors, and consequently a Will or noe  
 Hereabout hath been much diversitie  
 of opinion : Some bookes generally  
 speak that the wife may make an Exe-  
 cutor, but speak nothing of the hus-  
 bands assent, whether necessary or  
 not. Elsewhere we finde it mentio-  
 ned, that if the husband after the  
 wives death countermand (some  
 books false printed say command) the  
 proving of his wives Will, then it loseth  
 all force, or becommeth void and  
 of no value : but in this case is no men-  
 tion in what state this wife stood, and  
 whether she were Executor or not, nor  
 so much as whether she had any  
 thing in action, or Chattell real or  
 not ; so as nothing in particular  
 can be grounded upon that case. But  
 there are expresse opinions that the  
 husbands assent is absolutely necessary  
 even in this case, so as without it the  
 wives making an Executor shall be  
 meerly void, and consequently, he  
 whom she was Executor, shall not  
 by her death be dead intestate. And  
 of this opinion was *Babington*, Chief  
 Justice in the beginning of *Henry*  
 the first his time : Yet contrary hereunto

is the opinion of *Finew* chiefe Ju-  
 in the time of King *Henry* the  
*viz.* that where the wife is an Ex-  
 Executor, she may also make a will, and 12.H.7.24.6.  
 Executor without any consent or  
 of her Husband. And to this  
 opinion doth *M<sup>r</sup>. Perkins* after confi- Tit.Divis. f.  
 deration of the bookes on both sides 27.  
 line. But some will say that since  
 this in the late *Queens* time, this  
 has been contrarily resolved, *viz.*  
*in the case betweene An- Hill.29.Eliz.*  
*Ognell* Plaintiffe, and *Underhill* in *Com.ba.*  
*Apleby* Defendants, in the end  
 which Case, it is in expresse  
 terms said to have been then resol-  
 ed, that a femme Covert or marri-  
 ed woman, could not make an Execu-  
 tor, without the consent of her Hus-  
 band. To this I answer, that this  
 Case is to be construed with relation,  
*materiam subiectam, viz.* to the *Cooke. lib 4.*  
 matter, and point in question, and 51.b.  
 under consideration; which was that  
 of a woman, whereof wee have  
 before spoken, *viz.* one having  
 things in action, debts or duties to  
 her belonging, as there in particu-  
 lar it was arrerages of rent due to the  
 woman

39 H. 6. f. 27.

34 H. 8. S. Bro.  
Testaments: 218 El. 4 f. 11.  
Vavafor Inst.

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ned, that if the husband after the  
wives death countermand (some  
bookes false printed say command) the  
proving of his wives Will, then it leav  
eth all force, or becommeth void and  
of no value : but in this case is no men  
tion in what state this wife stood, wh  
whether she were Executor or not, nor  
nor so much as whether she had any  
thing in action, or Chattell real or  
not ; so as nothing in particular  
can be grounded upon that case. But  
there are expresse opinions that the  
husbands assent is absolutely necessary  
even in this case, so as without it the  
wives making an Executor shall be  
meerly void, and consequently, be  
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*viz.* that where the wife is an Ex-  
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 of a woman, whereof wee have  
 before spoken, *viz.* one having  
 things in action, debts or duties to  
 her belonging, as there in particu-  
 lar it was arrerages of rent due to the  
 woman

woman before marriage. As for the point of a Woman Executor to another person, it was never in that Case, under disceptation, nor nor once mentioned in the debate or arguments thereupon. Now considering the very forme, and phrase of judgments at the Common Law, which are thus, viz. *Ideo consideratum est per Curiam, &c.* not *Adjudicatum est*, that is, it is considered by the Court, not in expresse termes, that it is adjudged: This I say well observed (as to mee it seems very remarkable) gives us to know, that no more is adjudged then is considered of, the judgement being contained, and clasped up in the word, *Consideratum est*. Wherefore since in *Ognells Case*, the point of a woman coverts ability in Case where she is an Executor; to make a will and Executor, hath not been considered of; the eyes, tongues, nor thoughts of the Judges, being not once set upon it; It cannot bee, that that point is there resolved or adjudged. Besides, even in a few words expressing as to me it seems, the reason of that resolution, it appears not to have been the

the intent of the Judges, that the same  
 should reach or extend to this Case,  
 of a Woman covert Executor: for it is  
 added (as the reason of the judgement  
 may conceiving) that the Admini-  
 stration of the Wives goods doth of  
 right belong to the Husband, which  
 amounts to this in my understanding,  
 that where the Wives making of  
 Will, and consequently of an Exe-  
 cutor, may be prejudiciall to her  
 Husband, and prevent him of some  
 benefit or advantage, or tend to his  
 loss and disadvantage, there it shall  
 not be available or effectually without  
 his assent, and therefore not in the  
 case of her, who having debts or du-  
 ties to her due, would by making ano-  
 ther to be her Executor, exclude or  
 debar her Husband from that be-  
 nefit which to him should pertain,  
 as Administrator of her goods. Now  
 for the goods debts or credit to her,  
 as executor to some other, pertaining;  
 no benefit could redound to the Hus-  
 band, by having such Administrati-  
 on of his wives goods, for those  
 should goe, and be to the next of kin  
 of the wives Testator, taking Admini-  
 stration



nistration, *De bonis non administrat* of him, if she have no Executor, and therefore her making an Executor, touching these, brings no hurt nor prejudice to her Husband, and so out of the reason of *Ognells Case*. Since then it is so, and since the Law favoureth Wills, and it was by implication, part of his Will who made her Executor, that shee should have power to continue his Executorship, by making another to succeed therein after her decease, for performance of his Will; why should the Law give to the Husband, who can receive no prejudice thereby, power to give impediment thereunto; for *Frustra est inutilis potentia*, even reason it self frames, and awards against him in this Case a *Quare impedit*, or rather a *Non impedit*, as to me it seems. Wherefore to conclude, I take it to be the opinion of *Fineux* is good Law, that point of a feme covert Executor, though not in the other point, where she only hath debts, or things in action to her self due, for therein the resolution in *Ognells Case*, grounded upon good reason, gives me satisfaction.

tion to differ from *Fineux*, who making no difference between the cases, held the Husbands assent need-  
 less in both. *Posito* then that the Wife of *I. S.* having debts due to her selfe, and being also Executrix to *I. S.* makes without her Husbands assent, *I. N.* her Executor, and dyeth, what shall wee now say? shall we say, that as touching the goods, and credits, or things in action to her as Executrix of *I. D.* pertaining, this Will stands good, and *I. N.* as her Executor may prove it contrary to her Husbands Will; and that as to the credits to her selfe, in her owne right pertaining, the will is voyd, and therefore her husband may take administration? Shall she die both testate, and intestate; with a Will, and without a Will? shall shee have both an Executor, and Administrator? Why not? to severall purposes, as well as where an Executor is made onely for one particular thing, or one place, the Testator may else-where die intestate: and so where the Executorship is divided, as before is shewed, and one to whom part is committed, will prove

Note.

prove the Will, but the other whom other part of the Executorship is committed, will not take it upon him, here must needs be a division for part testate, and for part intestate.

As for the second point, viz. whether or women coverts, being made Executors, and so having the Office of Executorship put upon them, against their Husbands Will, there hath also been diversitie of opinions. In the time of King Edward 1. *Brab.* Justices saith she may be executor without her Husband, and the Administration shall be delivered to her onely. And I thinke he meant that this might be without the consent of her husband, or whether he would or not, for so it said in the time of King Henry the Seventh, to be the Law Spirituall, and indeed in Courts Spirituall, no difference is made betweene women married, and unmarried, for ought I can finde: there a Wife sueth, and is sued alone without her Husband; hee intermedleth not, nor is intermedled withall touching the things pertaining to his wife. But at the Common

13 Ed. 1. Fitz.  
Exec. 119.

2 H. 7. 15. b.

it is otherwise, and there as Bry-  
 Chiefe Justice saith, A wife with-  
 the assent of her Husband, cannot  
 Executor he meaning thereby, that  
 Husband may oppose and hinder  
 for such an one may be named Ex-  
 cutor in and by a Will, without the  
 knowledge of her Husband : let us  
 see, how after the death of the  
 testator, the Husband can hinder her  
 proving of the Will, or intermeddling  
 Administer, since it may be a mat-  
 ter both of much trouble and danger  
 to him, to have the Executorship fa-  
 lling upon his wife, and consequently  
 upon himself. On the other side, it  
 may be a benefit and advantage to the  
 husband, and therefore wee will also  
 consider, whether the Husband may  
 (though his Wife would refuse)  
 claim the Executorship, and fasten  
 upon her. The Testator there-  
 fore being dead, and fame or com-  
 mon bruit carrying it to the Ordina-  
 ry, that the wife of I.S. is made Ex-  
 cutrix, if she come not in *gratis*, or  
 voluntarily to prove the Will; *Pro-*  
 or a citation is to be sent out of the  
 spirituall Court against her, to en-  
 force

2 H.7.15.

force her comming in to take on her  
the Executorship. Shee comming  
may cleere, as well as any other  
person ( especially if her Husband  
concurr with her therein ) refuse  
this Office, trust and charge, so as  
there be no other Executor named, the  
Ordinary must commit the Admin-  
stration : If she should not come and  
appeare, shee should be excommuni-  
cate, as I take it, notwithstanding any  
allegation or intimation by her hus-  
band of his unwillingnesse to have her  
take upon her the Executorship. But  
suppose shee doth come into Court  
and offers her selfe ready to take the  
Executorship upon her, and on the  
other side, her husband expresseth his  
disassent thereunto, praying that she  
may not have the Execution of the  
Will to her committed, what will  
then be done? This I confesse per-  
taines to another learning, and not  
to that of our profession : but for  
much as I finde that in the Court  
Spiritual, a wife stands in the same  
plight and state as a woman sole, the  
Husband not intermedled withall in  
the affaires of the Wife ; Therefore

e on her  
omming  
y other  
Husband  
) refuse  
e, so as i  
med, the  
Admini  
ome and  
ommuni  
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doe I conceive that in that Court the  
 husbands refusall will not be of force  
 to hinder the committing of the exe-  
 cutorship to the wife not refusing, at  
 least if there come not a prohibition  
 to stay the Spirituall Courts such pro-  
 ceeding: but whether a prohibition  
 be in such a case to be granted or not,  
 as I finde no resolution in my books,  
 so will I not take upon me to resolve.  
 This stands cleere in the rules of the  
 law of *England*, that the wife is  
 under the husbands power, and can-  
 not contradict him in pleading and  
 doing other acts, even touching her  
 own Freehold: nay she cannot take  
 lands nor goods by gift or conveyance  
 without her husbands assent, as the  
 law hath been, and for ought I  
 know is taken. But if once the  
 Will be proved, and the execution  
 thereof committed to the Wife,  
 though against her Husbands minde  
 and consent, I think it will stand firm,  
 and the husband and wife being after  
 dead cannot say that she was never Ex-  
 cutrix, and I doubt whether the  
 wife administering without the hus-  
 bands privity and assent, although  
 X the

33 H.6.31.43.  
 39 Ed.3.1.

27 H.8.24.



18.H.6.4. The plea is that the Femme did or did not administer without speaking of the husband.

33.H.6.31. The husband may administer and prove the Will for his wife.

the Will be not proved, doe not conclude her husband as well as her self, from saying after in any suit against them, that she neither was executor, nor did ever Administer as Executor. Yet perhaps this Administration by the wife against her husbands minde, will as against him be as a voide act, else cannot I see how *Brians* opinion before cited, viz. that the wife shall not be an Executor, without or against her husbands minde, can be law. On the other side if the husband of a woman, named Executor, would have his wife to take upon her the execution of the Will, and to prove the same, but shee will not assent thereunto (wishing perhaps that gaine be benefit rather of to some her kindred by way of administration, then to her own husband by her Executorship as sometimes wives accord not well with their husbands) in this case I think the Court Spirituall will not fasten the Executorship upon the wife against her Will. But *dato*, that the husband though the Will be not proved, doth administer as in the wives right, but against her Mind and Will shall

shall she be now hereby bound & concluded, so as after she cannot decline or avoid the executorship: and surely I thinke that during her husbands life, she stands concluded at the common law, for that there she shall not be, nor can be sued alone as Executor, and then being sued with him she must joyn in plea with him, viz. that she neither was Executor, nor Administred as Executor, and then this act of her husbands given in evidence, will as I take it, cause that the verdict be found against her; not so after her husbands death: then shee may refuse, as the Lord Dyer saith, and saith as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be, where a woman so made Executor rather an husband after the Testators death, before either proving or refusing to prove the Will, and where she made Executor during the coverage, as there is in case of a descent of land to the heire of a disseisor; for when there is upon her such a state of action, she marrying before her re-

1 El. Dy. 166. b.  
there is cited  
3. H. rot. 112.  
*Nota per Bill.*

*The Office of*

solution or determination, doth upon the matter deliver it into the husbands hands: not so where it first findeth and falleth upon her in the state of coverture: if the husband were indebted to the Testator, this making of the wife Executor is as I take it, a release in law, as well as if she were the debtor but if after the Testators death she doe marry such a debtor, it is a devastation.

*The third Point.*

*Touching the administration or execution of the Office of Executor by a Femme Covert and her husband.*

**W**EE will now come to administer the execution of the will affirmed by concurrent consent of husband and wife, and the Will proved with both their likeing in the wifes name, and examine what acts the wife of her selfe is able to doe, and what her husband without her.

It hath been conceived by many

old, and by some of late, that if a  
 Femme covert or married woman ex-  
 cutrix released a debt of her testator,  
 or give a way the goods which she 7H.4.13.  
 hath as Executor, or deliver a legacy  
 bequeathed, it was firme and good,  
 and on the other side, that her hus-  
 bands gift or release was of no value,  
 for that the administration or executi-  
 on of the Will is committed to the  
 wife only, and some have gone so  
 farre as to say that she may sue or be  
 sued without her husband ( in the  
 Courts of Common Law, I meane, for  
 in the Spirituall Court it is true the  
 husband is not joyned with the wife  
 in suit ) but the law is doubtlesse in  
 all those points contrary, as not only  
 some opinion also was of old, *viz.* in  
 the time of H. 7. but also hath been in  
 the late Queens time resolved, for  
 otherwise, if the wives gift or release  
 should stand good, her act might ex-  
 ceedingly endamage her husband, and  
 make his goods lyable to the credi-  
 tors, the testators state being wasted  
 by the gifts or releases of his wife.  
 Therefore it was held in the said late  
 case, that unlesse due payment were  
 made

See 18 H. 6. 4.  
 Indebt the plea  
 shall be that  
 she hath fully  
 administred &  
 replic, that she  
 hath assents, ne-  
 ver mentioning  
 the husband.

33.H.6.31.

made to such women covert Executors, their releases or acquittances be voyd, and so also their gifts and grants : yea it was then held that the husband of the wife executrix, may give goods or make releases of debts at his pleasure. But doubtlesse by marriage, neither are the goods though personall, which the wife had as Executor, deuested out of her and settled in her husband as her owne goods are; nor if she dye, shall they accrue to the husband, if no alteration were of the property, but shall goe to her Executor or to the next of kin being Administrator of her Testament, if she have no Executor: & so was it held in the first yeare of Queen Mary: Yea though for any other goods which the wife had in her own right before marrying, the husband alone without naming the wife may maintain an action of trespassse; yet touching such goods as the wife had as Executor the action must be brought in the names of the husband and wife to the end that the dammages thereby recovered may accrue to her as Executor in lieu of the goods. So

must the replevin for those goods be in both their names. But although the husband be thus named with the wife, yet principally is it the suit of the wife, and therefore in such actions or in debt by husband and wife, the being Executor, if it come to trial by jury, the husband being an alien, yet shall he not have trial *per medietatem linguae* or *alienigenarum*, that is, by halfe aliens, as in other Cases where an alien is party to a suit is to be had. And whereto a wife made Executor, power is given to sell land of the Testators; she may sell to her own husband, as was resolved in the time of King Henry the seventh, where the Feoffees (it being land settled in use) were committed to the Fleet, for that they would not execute an estate to the husband, according to the wives estate. But of this I much marvell, since the Law intends the wife so under the husbands command and subjection, that it holds not her disposition of land to him by Will, free, nor therefore of force; and now shall this then be conceived to be a partial sale; yet

*M. 31. El. in com. b.* If the husband be to avow, it must be in the right of his wife Executor or Administrator. *Manfields case.*

*Doctor Julies his case.*

*10 H. 7. 20.*

*Bro. Just. Cui in vita 15.* Shee may sell to any other, but not to him.

*Fenner Just. in  
ba. reg. Pasc. 37.  
Eliz. & 34. E. 3.  
Bro. Cui in vita.  
15.*

No prejudice  
to them that it  
be good.

ria, and he that will put such power  
into the hands of a woman under co-  
verture, doth in a manner subject it  
voluntarily to the husbands Will.  
And it hath been held by some, that e-  
ven an infants or femme coverts con-  
veyance in such case of necessity should  
stand firme and unavoydable, because  
of the condition expresse or implied,  
that the state should bee voide, if no  
such conveyance made.



## CHAP. XVIII.

*Touching infants, and their making  
or being made Executors.*



Being now to consider  
of disability by age,  
for want of years in  
persons making or  
being made Execu-  
tors: Let us first  
take view of the severall ages of men  
and

women to severall purposes ma-  
 all in the laws judgement and re-  
 st. And first, touching a woman;  
*Ingford* in *Henry* the sixt his time  
 1. 35 *H.6.41. b.*  
 ws, and other books approve that  
 hath six severall ages, respected  
 and by the law. As first the age  
 seven years, for her father to have  
 of his tenants to marry her. Next  
 2.  
 years to deserve dower, that is,  
 in case shee be of that age at the  
 of her husbands death, she shall  
 endowed, but not if she be any  
 ing under those yeares; the Law  
 ing Physically informed that a wo-  
 at those yeares may conceive a  
 child, but not under them. But of  
 somewhat different opinion was, as  
 seemes, the Parliament in the late  
 Queens time, when it was made fe-  
 ny to have unlawfull carnall know- 18 *Elix. cap. 7.*  
 ledge of any woman child under the  
 age of ten years, it being then con-  
 sidered, as I think, that no such could  
 consent. The age of twelve years is  
 3.  
 a womans time for assenting or disas-  
 senting to marriage in more tender  
 years had. For so it appeares by divers  
 booke, although Master *Littleton*  
 have



4. have here no distinction between male and female. The age of fourteen years is a womans time to be in wardship or not, so as if she be above those years, at the time of her ancestors death, she escapes wardship. The age of sixteen years is her time of coming out of wardship, being once fallen under it, although had she been full fourteen she had escaped it; yet not so before at the time of her ancestors death, wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly, the full age of a woman whereby she is enabled firmly and avoydably to make grants or conveyances, is one and twenty years, as well as for the male, before which time, be it that she being sole, makes a feofment or other conveyance, or being married alien her land by Fine and her husband of full age joyn with her, yet is it infirme and avoydable.
- 5.
- 6.
- 1.

Now of the male, or Man; The first age materiall and settledly resolved on, is twelve yeeres, from that time each Male is, at the Lect,

swear

are his fidelity to the King; this  
 men doe not, and therefore are they  
 said to be out-lawed, but to be  
 ived, because they have not this  
 entrance into the Law which males  
 have. This hath been, as I think, the  
 ground of that speech, That women  
 were lawlesse creatures.

The second age of males is foure-  
 teen yeeres, accounted by the Law  
 the age of discretion, especially mate-  
 riall to two purposes, viz. First, that  
 one under that age commit an act  
 amounting to felony, yet is hee to  
 be free from the attainer and pu-  
 nishment incident to a fellow: regular-  
 ly it is thus, but *non est regula quin fal-*

One of much lesse yeeres having  
 attained ripenesse of discretion and  
 discerning, shall incur the like at-  
 tainer as one of full age, as was re-  
 corded in the time of K. Henry the se-  
 cond, touching an infant but of the  
 age of nine yeeres, who having killed  
 another boy of like age with his  
 knife, and then hiding the slaine boy,  
 and excusing the blood found upon  
 him, by saying that his nose had bled:  
 was held by the Judges, that he

was

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3 H.7.f.1.6.

was to be hanged as a felon, his such non-age notwithstanding. The other point, touching which this age of fourteen yeeres is especially materiall is touching an heire of lands held by Soccage; for in case such heire be under that age, he is to be in Ward to the next kin, but if he be of that age he is not to be in Ward at all, for that the Law judgeth him to be of discretion at those yeeres, and therefore a Guardian in Soccage being in effect but a Bayliffe accountable, he hath no neede of such an one other than such as himselfe shall choose.

The third age in and touching males materiall, is fifteen yeeres; for every Lord of a Manour, or one having Freeholders in Soccage, or by Knights service, when his eldest sonne commeth to that age, viz. fifteen yeeres, is to have of them ayde for the making of him a Knight, towards which every one holding by a whole Knights Fee, is to pay twenty shillings, and so ratably for more, more, and lesse, lesse: and each holding twenty pound land in Soccage; is to pay

the like summe, and so ratably more or lesse.

The fourth age of males, is the full age of one and twenty yeers, which maketh him free from Wardship, having lands held by Knight-service descended unto him: And also makes him able to alien lands or goods, makes firme his bond, Statutes, Recognizances, &c. for although at fourteen the law judge him of discretion, yet doth it not hold him fully free, till Twenty one.

The last age of males respected by the law, is seventy yeates, at which time the Sheriffes are to forbear to impanel them in Juries; and in case they doe not, such old man may have writ to the Sheriffe, grounded upon the Statute for that purpose, made in the time of King Edward the first, commanding such Sheriffe to forbear the impanelling of him; and he may have an action to recover damages upon that Statute: This is called by most, a writ of Dotage; a word perhaps, anciently taken in a good and favourable sense, *Pro dote etatis*, viz. a gift, priviledge, or exemption allowed.

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<sup>5</sup>  
*Oblitum.*

Another of 60. to exempt from being compelled to serve by the stat. of labour-ers 23. E. 3c. 1. w. 2 cap. 38. 13. Ed. 1. no. na. br. 165.

Devifes. f. 97.

No good reason, for one may make an ill account, specially having a childes direction for his doings.

allowed to age in favour thereof, as a benefit. Having thus by the way of ingredient or introduction taken view of these severall ages, let us now see wherein, and how, age is materiall, touching them who are to make or to be made Executors, and what age is required thereabout. *Mast. Perkins* saith, that one of foure years old may make a Will, and consequently Executors: and his reason is because the Executors being to account before the Ordinary, it cannot be intended, but that the goods shall be distributed for the good of his soule: He speakes, as if he only made an Executor by his Will, but did not bequeath any thing, but left all to the Executors conscience and discretion which is not usuall, though feasible as before I have shewed, or said at least. But admit it were so, and the bequest at all contained in the Will yet since at that age an Infant hath no discretion to elect a fit person to distribute his goods, mony, and other things; no, nor to make continuation of an Executorship to another, whom perhaps the Infant was Executor

I cannot see that his Will should  
 of any force. But if he be of the age  
 14. yeares, being the age of discre-  
 tion, in the judgement of Law, then I  
 would hold him able to make a Will  
 though yet he be an Infant till 21.  
 yeares, and can make no gift of land  
 or goods, which shall be of force.  
 And *Babington* chief Justice, to other  
 purpose makes like distinction be-  
 tween an Infant of such tender years,  
 and one come to the yeares of discre-  
 tion. So also, as before we shewed,  
 in the Case of felony. And that  
 law also sounds that which *Hanck*: 2.H.4.22.  
 in *Henry* the fourth his time, viz.  
 that an Infant of 18. yeares old may  
 be a disseisor; as implying, that his  
 yeares may be so tender, that as *Can-* 40.Ed.3.44.  
 ton saith of an Infant in *Edward* the  
 third his time, he is not to be inten-  
 ded able to know or discern between  
 good and evil: me thinkes therefore  
 should be at the least of the age of  
 discretion, viz. 14. yeares, who  
 would be able to make a Will, and  
 consequently an Executor. And the  
 same for an Infant of 15. yeares  
 to bequeath by Will, hath, as to  
 me

37.H.6.5.

11.H.6.f.40.b

me it seemes, affinity with this opinion, though there the Case was of law in a Borough, devisable by custom and that way reflecteth the Case the time of King Henry the sixth where it was said, that an Infant under 15.yeeres of age should not walke by his Law, viz. take an oath to acquit himself of a debt, or excuse his default in an action reall. And further reason of this opinion will arise out of the consideration of an Infant made Executor.

co.lib.5.f.29.  
P.

Now touching an Infant made Executor, how young soever he be, the making of him so is not voyd, but yet the execution of the Will, which is the performance of the office of Executor, shall not be committed to him till he come to the age of 17. yeeres by the Law spirituall: and till then (for that he is not able to doe the part of an Executor) administration is to be committed to some other; yet if it be a woman-infant who is so made Executrix, in case she be married to a man of 17. yeeres old, or more, notwithstanding it is as if she were of that age, and her husband shall have the Execution of the

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the Will, and if Administration were before committed during the minority of the woman, it shall now cease, as is said in *Princes Case*. Yet I doe a little marvaile at these opinions, considering that these things are managed in the spirituall Court, and by that Law; and it intermedles not with the husband, in the wives case; now by that Law, and not our common Law, comes in this limit of 7. yeers. And I have seen it otherwise reported in, and touching this point.

Further, touching Infants Executors, and under that age of 17. yeers, this is to be noted, viz. that such a one is not able as an Executor to assent to a legacy, so as it may by virtue thereof settle in the Legatee. Although Administration be during such minority committed with speciall words of restraint or limitation, viz. that it is done to the use or profit of the Infant Executor, then no sale of land or goods or assent to Legacy by such Administrator will binde or prejudice the Infant Executor; But otherwise perhaps if the Admini-

Y

stration

*M. 41. & 42.  
Eliz.*

*Co. lib. 5. f. 29.  
But payment  
is to be made to  
the Exec. and  
not to the adm.  
M. 15. and 16.  
El. com. ba. rep.  
67. Co. lib. 5. f. 29*

*Co. Lib. 6. fol.*  
671.

stration during the minoritie be committed generally. And if the Testator himselfe, making an Infant Executor doe also appoint another to be his Executor, during his nonage, expressing it not to be only for the benefit, and behoofe of the Infant Executor, I doubt whether this temporary Executor stand any whit restrained from what pertaines to the power of an absolute Executor, for there may be perhaps difference between him to whom the owner of the goods commits the government of them, though but for a time, and in speciall manner and an Administrator, so specially made by the Ordinary, another being presently, by the Will of the owner or Testator to have the Administration, in whom for a time legal defect is found. But now let us passe over this age of 17. and consider of the Infant between that time of his being admitted to take upon him the Executorship, and his accomplishment of his full age of 21. First then suppose that he doth release debt due to his Testator, whether shall this be good to binde him, and

to discharge the debtor as well as if the Executor had been of full age, he now having proved the Will, and being by the Law spirituall approved an able Executor. And this point comming in question in *Russels Case*, in the late Queens time, consideration was *H.26.Elix.* had both of divers good reasons for enabling of this release, as that an Executor represents the person of his Testator, and in his right, and power, doth these Acts, and not in his own, and therefore his infancy, which is a state or condition of his own naturall person, shall no more disable him when it doth the King, a Mayor or other head of a Corporation. Also *16.H.6.ret.45. 21.Ed.4.13.24* divers Bookes were found to run that way, as well in the case of an Infant, as of a Femme Covert. But upon great deliberation in the Kings Bench, and upon conference had with the Lord *Anderson, Manwood*, and other Iustices, it was resolved, and adjudged, that the release of an Infant Executor, without payment of the debt or duty, would not binde or Barre him: First, for that if it should, it *co.lib. 5. fol. 27.* would be a wasting or devasting of

the goods of his Testator, and so would charge his owne goods. Secondly, it would be a wrong which an Infant could not doe by his release. Thirdly, It was no pursuit nor performance of the Office or duty of an Executor, but the contrary: And upon this judgement, a Writ of error was brought in the *Exchequer* chamber, where it was agreed by all, that the Release was not effectually nor binding, so as this point now had the resolution of all the Judges of *England*. But it was agreed, that if payment or satisfaction had been made, then the Infant Executor might have made a good acquittance and discharge, and indeed payment it selfe, if proved, brings discharge enough, except in the case of a single Bill; Note that the principall case adjudged was not of a release of any debt or duty by specialty, but of trespassse in conversion of goods found or taken in the Testators life time. But *Posito*, that this Infant had assented to a Legacy; whether will this binde him or not? for in the said Case of *Russell*, it is said, that all things which

which an Infant doth according to the Office, and duty of an Executor, will stand firme; now it is part of his Office to pay, and execute Legacies. Yet since this act amounts to a vastation or wasting of the Testators goods as well as the other, in case there remain not goods sufficient for payment of the debts, and consequently, as well as in the other case, the Infants owne goods would become liable to his Testators debts; I doubt, and incline, that it is not nor can be effectually, for except in the other we admit a want or possibilitie of want of assets or goods, the release would neither hurt the Infant himself, nor doe wrong to any other, and that admitted, this case is of like prejudice; for if this asset should be void, so also would be his payment of Legacies, and how then were he an able Executor at the age of 17. yeers to sue, and be sued for debts, and Legacies, and upon suit it cannot be shewed that debts will take up all, or disable the payment, then happily he may be forced to pay; *Quare* notwithstanding, whether these acts, though voluntary,

stand not good upon *Bene esse*, or conditionally, *viz.* if there be besides goods sufficient; &c. or that else the nonaged Executor may have an Action of accompt for the money by him payed to the Legatee, and also avoid his assent, where that is only needfull. But doubtlesse neither the assent of such Executor before his age of 17 nor any payment of a debt to him could be good, although such action to or by another Executor, before the proving of the Will, would stand firme, and good: for this Infant wants not onely proving, but also ability to prove his Testators Will, yet the Will stands suspended, and the Testator, as it were intestate, whilst the Administration stands in force, for as during that time, nothing can be done by any as Executor; and therefore there is great difference between the Cases. What if payment of a Legacy be made to an Infant, can he make a sufficient acquittance? This I confesse, is besides the point in hand yet because it concernes Infants, and Executors (though not Infant Executors) it is not amisse here to call

some

some thoughts, and words upon the  
 point, for that it many times perplex-  
 eth both Executors, and Legatees.  
 First therefore, in case the Executor be  
 of the yeers of discretion, viz. 14. I  
 hold it cleer, that any payment to him  
 made will stand good, for that the  
 law at that age holds him able to go-  
 verne, and manage his owne Lands  
 held in soccage, and consequently to  
 receive the rents thereof, where-  
 fore whether he who makes such pay-  
 ment have any acquittance or not; if  
 we have prooffe of the payment, he is  
 well enough acquitted from any  
 second payment, and if without  
 payment he get an acquittance, it will  
 not suffice, the infancy of him who  
 makes the acquittance considered.  
 Besides, if the acquittance be as most  
 usually they are, but signed onely with  
 the name of the maker, and not seal-  
 ed, it is only an evidence or prooffe  
 of payment, and no pleadable acquit-  
 tance, because no deed, so as it no-  
 thing differs from proof by witnesses,  
 save that it is not mortall as they. But  
 now if the Infant be under the yeers  
 of discretion, what shall we say to a

Notes of re-  
 ceit called ac-  
 quittances.



- payment to him specially, if he be but three or foure yeeres old, or thereabout : here I thinke caution is to be used by the Executor generally, and the surest way is, if he feare to keep it in any respects, to pay it into the Court, where it is recoverable, *viz.* where the Will was proved ; Yet the case so may be, as that this payment may not be at all safe for the Executor. As put the case, that he entered into bond or Statute to pay all Legacies by such a day, to the severall Legatees, here I thinke, the payment into the Court spirituall sufficeth not, for that must make the receipt to be with some charge, which is in some kinde an abatement ; there I thinke therefore legally to secure the Executor, the payment must be to or in the presence of the Gardian, because of noriture, *viz.* him or her who hath ( though not as Guardian, in respect of lands ) the custody or education of the Infant : for otherwise to pay it into the hands of such a tender Infant, separate from any governour, or Gardian, were to expose it to losse, both for that hee is not able to count

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the

the summe, and for that, he yet not  
 coming come to discerning yeers, were  
 with *Hops* Cocke, to part with  
 Charles or coyne for plumes and tri-  
 of no vawew. But in case no bond  
 or other collatterall penalty lie upon  
 the Executor, or in Case the Bond  
 Statute be onely to performe the  
 Will generally, which nothing  
 alters the course of payment,  
 which by the Will the Law layes up-  
 on Executors, then is not the Exe-  
 cutor put to any such payment, nor  
 he pay without demand, and ac-  
 quittance, as in case of payment up-  
 on a single Bill, or of a rent seck  
 where no distresse can be taken, nor  
 other penalty incurred: yet in that  
 case, if demand be, and acquittance  
 ready to be given, let the Executor  
 take heede, in Case he be bound to  
 performance, that he stand not up-  
 on the invalidity of the acquittance in  
 respect of nonage, for as I have said,  
 proove by witnesses may supply a  
 nullitie of acquittance, and much  
 more the weaknesse or imbecillitie;  
 payment according to the Testators  
 appointment being the matter which  
 acquit-

acquitteth the payer, and this the Executor may have testified under the hands of divers witnesses expressing circumstances, so as all dying may continue safely from second payment as well as an acquittance, the witnesses whereunto are subject to mortalitye, as well as the other. But here in Courts of equitie doe often interpose helpfully for them who seek no evasion from payment, but only security in paying. And of Infant Executors, and by occasion thereof, of infancy in Legatrees, or Legatees thus much.



## C H A P. XIX.

### *Of Legacies.*



Although these bee not recoverable at any by the common Law but most naturally at and by the Law Ecclesiasticall, yet by suits in Courts of Equiry, as the Chan

the Chancellor and Court of Requests, they are often obtained, and of many things touching them the common law taketh notice, and hath manifold occasions so to doe: we will therefore consider thereabout these parts or points, some whereof have been in part before touched upon on other occasions.

*Whether any legacy in certaine and lying in prebend, may be taken, or had, without the Executors assent; by the legatee, or him to whom it is bequeathed?*

*When an Executor can, or safely may pay, deliver, or assent to a legacy.*

*Whether one Executor alone may do it, and what if the Executor be an Infant or woman covert?*

*What shall amount to an assent of the Executor, and what to a disassent or disablement of assent?*

*How a lease or chattell reall may be given to one for a time, with remainder to another, how not.*

*Where an assent to the first or one part of the bequest shall imply or amount to an assent for the residue.*

*Of*

7. *Of the manner of assents, and therein of assents conditionall.*
8. *What manner of interest be in the remainder of a lease after the death of another hath during the life of that other, and whether he may dispose of it during that time, and how?*
9. *Whether this remainder can be defeated by any act of the devisee for life or by the death of him in remainder first?*
10. *By what acts or accidents a legacy may be forfeited or lost, and therein of revocation, death before, &c.*
11. *Whether the Executors assent should have relation to the testators death, and shall make good a grant before made by the Legatee.*

If the executor give it to another, the Legatee hath no remedy at the Common Law  
*per Prisot. 37.*  
*H.6. 30.*

**A**S for the first, wee have before shewed the assent of the Executor to be necessary before any legacy can be had, for that debts are first to be paid, and that the Executor is to looke at his perill. But hereto added a little out of Master Swinborn, a learned Civilian, who saith, that in case any goods be in the hands, or custody

of I.S. & the owner doth bequeath  
them to him, then may he keep or re-  
turn them against the Will of the Ex-  
ecutor, 'till so as there be other sufficient  
goods in the hands of the Executor  
for payment of all debts: but though  
as it seems would it stand in the  
ecclesiasticall Law, yet for that no  
property is transferred to the Legatee  
without the Executors assent, there-  
fore doubtles the executor may at the  
common Law recover the thing with-  
held, or dammages to the value a-  
gainst the Legatee detaining it. An-  
other case there is, wherein as the lear-  
ned Civilian saith, the Legatee may  
take the thing to him bequeathed ly-  
ing in prender, viz. Horse, other beast,  
or peece of Plate, or other like thing  
down and in being; and that is where  
the testator doth expressly so appoint  
in his Will. But herein doubtlesse the  
common Law, at and by the which  
debts are recoverable against Execu-  
tors will oppose the Law Spirituall,  
and else by such appointment the Te-  
stator might cause that all his goods  
should be taken by legatees, and that  
none should remaine to pay debts.

Yet

Yet if there be other goods be-  
sufficient for payment of debts, th  
indeed I see not how the Executor  
hinder such taking without vio  
ting his oath taken for performan  
of the will. If any say that it is a  
breach of Oath in the other case  
say he observeth not that there  
clause in the Will, being against  
law, is void, and consequently th  
is a nullity upon it, and it is as if  
such thing were in the Will, and  
the oath extends not to it. And a  
chattell shall not be transferred to  
stranger without the Executors  
sent; so if the devise be to the Ex  
cutor himselfe, till he elect to take  
legatee, it shall be in him as Exec  
tor, as appears by the straine and  
gument of two cases in *Plowd. Com  
ment.* and more lately in the King  
Bench, the point being divers day  
argued was at last so resolved by th  
Judges against one: and the reason  
*Cooke* at the Barre was very good, fo  
here the Executor sustaines two po  
sons, viz. an Executor, and Legate  
and so all one, as where the beque  
is to another, for *Quando duo jura*

*Weleden and  
Elkinton. &  
Paramour and  
Yardley.  
Portman and  
Simmes case.  
Trin. 37. Eliz.  
All but Gaw-  
dy so agreed.*

*currunt in una persona, æquum est  
essent in diversis.*

As for the second point, it may have  
two parts: First, when the Ex-  
ecutor is able to give such assent to a  
legacy. And secondly, when he may  
do it with safety. As for the first,  
he is able before probat of the Will  
to assent unto the execution of a lega-  
cy, as elsewhere is shewed, and that  
though he be not of full age of 21.  
years; but if he be under 17. years,  
as he is not able to take upon him  
the office of an Executor, and there-  
fore Administration is during that  
time to be committed to some other;  
where his assent is not of force or effe-  
ctual, as we finde in *Princes* case to  
have been held in the case of *Pigot* and  
*Wescombe*. As for the second part, till  
debts bee payd, the Executor  
may not safely consent that the Lega-  
cy enter into the lease or chattell de-  
scribed, no more then he may pay mo-  
ney bequeathed, if there be not suf-  
ficient also to pay all debts. Of these  
things more is said elsewhere. Yet  
because the Reader or he that desires  
direction in these points will looke  
for

21 Eliz.D.367.

Co.lib.3.f.29.



for them under this title, I thought not good here to be altogether silent touching them.

6 H.7.5. If the bequest be to one of the executors, he may take it without assent of his compan. yet if a debt, his compan. may release it. 48 E.3. 14.15.  
So held where but one of the Executors during nonage assented, in the case of Rhetorick and Chapel. H.9 Jacobi.  
Rot.895. in b.1. reg.C.

And for the third point, viz. whether the assent of one Executor where there be many, be sufficient, I see no how to doubt, since any one Executor may give away any goods of the Testators or release any debts due to him, therefore much more assent which is no more or greater work in effect then an attornment of one lessee upon a grant of a reversion. And where there want to pay debts, he only who assented shall answer for it of his own goods, and not his companions. But if this Executor be either under the age of 17 years, or under coverture viz. a woman married, such is not able to give good assent to binde the others, no nor themselves, for thereby the Infant might draw a debt upon himselfe, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husbands assent is sufficient where the wife is Executor, for his acts whom she hath chosen to be her head, may prejudice

prejudice as well her as himselfe; yea though she were within age, yet he being of full age, his assent will stand good. But if he, or another Executor in his owne right be above 17. years of age, and under 21. I doubt whether now his assent will be sufficient, at least except the case be put that there be assets sufficient; which perhaps may there be materiall, though not in the other. See more thereof after, in the title of Women Power, and Infants executors.

As to the fourth point; first there may be an assent and election implied, as well as expressed: for if in the will or bequest the Legatee be appointed to doe some act as in respect of the legacy, and the Executor doth accept the performance thereof, this amounteth to an assent. So if the devise be to an Executor for the education of some children, which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as executor, as appears by the case of *Paramoor* and *Hardly*, *Plowd.* 543. So if an horse be bequeathed, and one offering to buy

See *co. lib. Intr.* 150. The Executor being devisee for life said, the other should have it after her death and he entred and tooke administration. she dying intestate, yet held Assets in him.

Z

him

This *M. 19. H.*  
*7. Rot. 318. See*  
*lib. Intr. 321.*

One gave the  
 third part of  
 his goods to *A.*  
 with whom  
 the Execut. ac-  
 counted for a-  
 mount, and *B.*  
 sued for that  
 summe in debt  
 but no judge-  
 ment upon de-  
 murrer.

*Tr. 37. Eliz. in*  
*ba. reg.*

Where be-  
 quests to an  
 Exe. himselfe.

him of the Executor himselfe, he di-  
 recteth him to goe and buy the horse  
 of the legatee; or if the Executor  
 himselfe offer money to the legatee  
 for the horse, this implyeth an assent  
 that it should be the Legatees by the  
 Will: And so was it held in the case  
 between *Low* and *Carter*, where the  
 Devisee of a terme did grant it to the  
 Executor; and this acceptance of a  
 Grant from him was held to imply  
 the Executors assent that it should be  
 his to grant. But I see not well how  
 that should be law, which in the lat-  
 ter part of the *Lo: Dyer* is found, viz.  
 where a terme was devised to *I. S.* and  
 he was made Executor, and after the  
 death of the Testator entred and oc-  
 cupied the lands a whole yeare with-  
 out proving the Will, that this was  
 an election to have it as devisee, and  
 not as Executor. For first, he had  
 good right to the terme as Executor  
 before *Probat*, and so might clearly  
 in that right have taken the profits  
 although it had not beene devised or  
 bequeathed to him, and that before  
 any Will proved. Secondly, he could  
 not by right have it as legatee with-  
 out

assent of himselfe or some other as  
 Executor. Therefore this generall  
 acceptation can determine no electi-  
 on, as elsewhere is held. As for disaf-  
 fent or disablement to assent: as if  
 the Executor doe once declare his as-  
 sent that the legatee shall have his le-  
 gacy, he may then enter into it, or  
 take it, notwithstanding the Execu-  
 tors countermand, or revocation of  
 his assent after. So on the other side,  
 thinke if he doe fully and expressly  
 say that the legacy shall take effect,  
 he cannot after make a good assent  
 thereunto; for that election once  
 made must stand peremptory, be it  
 refusall to assent, or assent. Yet *Quere*  
 of this, for that the refusall to assent  
 may be checked by sentence or de-  
 cree, in the spirituall Court, or Court  
 of Equity, and so an assent be infor-  
 med. But if the power of assenting be  
 legally lost by the meanes aforesaid,  
 i.e. disabled, I see not how any le-  
 gal interest can be transferred by  
 that compelled assent, howsoever de-  
 creed. And what is said of a legacy  
 bequeathed to another, the same may  
 be understood in case where the be-

*Tr. 37 Eliz.*  
 If he by will  
 bequeath it to  
 I. S. this is an e-  
 lection to have  
 it as legatee.

So if the Exec-  
 take a new lease  
 his assent after  
 is void. *Tr. 37.*  
*Eliz. in Carters*  
 case.

*19. Eliz. D. 359*

quest is to the Executor himselfe, and he makes his election to have it as legatee, or as Executor. But if where an Horse is bequeathed to *A.* the Executor after the Testators death doth ride the horse, or use him in the coach or in the Plough; I doe not take this to be any such disagreement to the execution of the Legacy, as that the Executor cannot after assent to the Legatees having thereof, no more (though it be somewhat more) then where a drinking-cup is bequeathed, and the Executor, after the Testators death, doth use it to drinke in; nay, if a lease of land be bequeathed to *A.* and the Exec<sup>r</sup>. continueth the depasturing of the Testators cattell therein, yet is not this any disagree<sup>m</sup>ēt to the execution of the Legacie: but if this lease-land were not let out by the Testator from yeere to yeere, and the Executor dischargeth the Tenant, and taketh it into his hands at the yeeres end, this I conceive to be a dis-assent to the Legacie, and so also perhaps may his taking or distraining for any rent thereupon due, after the Testators death; yet am I not resolute, that

the

the dis-assent is so peremptory and unchangeable, as the assent, remembering the case in King *Henry* the eighth this time, where a terme being granted by a Lessee conditionally, so as the assent of the Lessor could be had by such a day, though the Lessors assent were at one time denied, yet might it be yeelded at another, so as it were at any time before the day: But yet there it was held, that if no time of assent were limited, then one expresse deniall or refusall would be peremptory, so as the refusall were expressed to the party to whom the assent was to be given, otherwise, if it were but in speech to or among strangers. This and the former case, 19. *Eliz.* give the best light to this point that I remember. Now for disablement to assent, it was held in the fore-mentioned case of *Low* and *Carter*, that where a terme is bequeathed to *A.* and after the Testators death, the Executor takes a new lease of the same and for more yeeres in possession, or to begin presently; now by this was the terme left by the Testator surrendered and drowned, so as it could not

14. H. 8. 23.

*Dy. 359.* After choice once made, no variation.

pass to *A.* by the Executors assent after.

And to the fifth point, *viz.* in what manner a lease for yeeres or other chattell reall may be bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a lease for yeeres was bequeathed to one for life, or for so many yeers as he should live, whether the limitting of a remainder thereof after his decease were of any validity in law or not: and this doubt had this ground; any state for life in the judgement of law is greater than any terme for yeeres, therefore when a testator hath by his Will given his terme, or his house or land, which he so holdeth for yeers to one for life, or for so many yeeres as he shall live; this Testator and Devisor hath not in the judgement of the law any estate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another: But after many arguings and debates, it was in the late Queenes time resolved that such a remainder was good, and that if the first Devisee died before the

terme

Terme expired, that then he to whom  
 the remainder was limited, might *Plow. Com. 520.*  
 enter and enjoy the residue of the *Sc 542.*  
 time: As for the giving of part of the  
 years to one, and the residue to the  
 other: *viz.* If the terme being twen-  
 ty years, the Lessee bequeatheth ten  
 thereof to his wife, and the remainder  
 to his Daughter: Of this no doubt  
 was, but that it was good, for  
 that after the first state limited, there  
 remained a further terme, *viz.* tenne  
 years more in the Devisor, whereof  
 he had power to dispose, whereas in  
 the other case, after the term limited to  
 one for life, there remained but a pos-  
 sibility that this life should not take  
 up the whole terme. But now, put we  
 the case a third way, *viz.* that the ter-  
 mor deviseth or bequeatheth the  
 thing in lease to one childe intaile,  
 and with remainder to another, and  
 dieth, and the first entereth, and dy-  
 eth without issue; now whether shall  
 the next in remainder, or the Execu-  
 tor of him so dying have the terme re-  
 sidue; and this Case came in questi-  
 on, and was adjudged about the mid-  
 dle of King *John* his reigne, in the



Both *Alexander* and *Ralfe* were Executors; but that makes no difference.

Exchequer, for there Master *Hamond* holding by lease for yeeres from the Crowne, the Mannor of *Akers* in *Kent* devised the same by his Will to *Alexander Hamond* his eldest sonne, and the heires males of his body, with remainder to *Ralfe Hamond*, another sonne in like manner, and the like remainder to *Thomas Hamond*, and made the said *Alex.* Executor, who after his fathers decease, elected to take as Legatory, and after *Ralfe Hamond* died, leaving issue male, and making his wife Executrix; *Alexander* not having issue male, granted the whole terme by deed to *B. and C.* for the behoofe of himself and his Wife, during their lives, and after to the use of his yongest daughter, whom Sir *Robert Lenkenor* married; then *Alexander* dying without issue male, the wife, and Executrix of *Ralfe Hammond* entered, claiming the terme, and being kept out, sealed a Lease, whereupon an *Fjeēt. firmæ* was brought, and a Jury appearing at the Barre in the *Exchequer*, found a speciall verdict in effect *Ut supra.* And in argument of this case, first the maine question was,

as, whether this case were all one in  
 law with the former, where a terme  
 was devised to one for life, with  
 remainder over so as, by death of  
*Alexander Hamond* without issue  
 male, the terme should goe to the  
 next in remainder, as in the other  
 case, by the death of the Devisee for  
 life, dying within the terme, it should  
 goe. And on the Plaintiffes part it  
 was urged to be all one, so that by  
 virtue of the Bequests *supra*, *Alexander*  
 had an estate to him, and his Exe-  
 cutors only, so long as there should  
 be heires males of his body, and hee  
 dying without such issue, the terme  
 remained to the Executors of *Ralfe*,  
 who had the remainder in like man-  
 ner, and left issue male, which still li-  
 ved, and so that seate of *Ralfe* yet had  
 continuance. For it was admitted by  
 the counsell on that side, that the  
 terme could not goe to the issue male  
 of *Ralfe*, according to the words, and  
 intent of the Will, since it was impos-  
 sible to make a terme to descend  
 without Act of Parliament. This  
 therefore they said the Law should  
 worke, which was neereft to the  
 in-

intent, viz. that after *Alexanders* death it should goe first to his Executors, and Assignees, so long as issue male of his body doth continue, and for want of such issue, then to *Ralfe* his Executors and Assignees, so long as his issue male should last, and therefore in this case, the issue male of *Alex.* failing, the Executor of *Ralfe*, whose issue male sayleth not, should enjoy the terme, and so judgement ought to be given for the Plaintiffe, being Lessee of that Executor: on the other side, it was said by the Defendants Counsell, that this Case differeth much from the other Case, where the terme or Land held by Lease, is given but for life to the first, with remainder to another, which Case, as having been often resolved, was cleerly admitted to be good Law; for in that Case, the intent of the Testator might, and did take effect. But in this Case, if the Land should goe to the Executors, and Assignees of *Ralfe Himond*, it must goe against the intent of the Testator, whose mind, and Will was, as it appears by his word, that it should goe only to the issue male of one son after  
ano-

other, and not to any Executors.  
 Now then since this intent was so con-  
 trary to the rules of Law that it could  
 not take effect, therefore it must be  
 void: and so all the words of heires  
 standing voyd, the Will is to be  
 construed as a sole and absolute gift,  
 and bequeathed to the said *Alexander*,  
 and consequently the terme must  
 be to his Executors, and af-  
 ter his decesse. And for this point resemblance  
 was made to a Case resolved in the  
 Kings Bench, where a Lease was  
 made by indent. to *A. Habend. to A. B. and C.*  
 for their lives: now because *B.*  
 and *C.* could take nothing, it was re-  
 solved that *A.* should not have it for  
 their lives, but for his own only. This  
 Case was said to come very close in  
 reason to the Case in question; for as  
 here the intent of the Lease was that  
*B.* and *C.* should be estated for their  
 lives, and since that could not bee,  
 therefore the naming of them should  
 be utterly voyde, and as if they had  
 not at all been named; and their lives  
 shall not stand as a measure for the e-  
 state of *A.* So in another Case the  
 intent of the Will, being that the  
 Lease

*Windsore and*  
*Holford, vel*  
*Holbord in 28.*  
*Et 29. Eliz.*  
*argued: and*  
*Tr. 29. Eliz.*  
*adjudged.*

Lease or Land Leased should go to the  
 heires Males of the body; first, of *Alexander*,  
 and after of *Kalph*; since this cannot be,  
 therefore the words, and name of heires  
 males should stand for a meere blanke  
 and cipher, and not to measure out any  
 state to the said *Alex.* and *Ra.* and their  
 Executors and assigns. Also it was said  
 on the defendants part that an estate for  
 life in the judgement of Law is of so short  
 and uncertaine continuance, that if *A.*  
 make a Lease to *B.* for his life, and after  
 make a Lease of the same Land to *C.*  
 for years, now, shall not this latter  
 Lease be void absolutely, for any part  
 of the term, but shall stand in expectance  
 of the death of *B.* and as soone as he  
 dyeth, shall take effect immediately,  
 whereas if the Lease to *B.* had been  
 for ten yeeres or any like term, then the  
 Lease to *C.* should have been voyd for  
 so many yeeres of his terme, thus it  
 appeares that a State for life is very  
 momentary in the judgement of Law,  
 and not reputed of any certaine  
 continuance so much as for a day,  
 but it is otherwise of an estate taile,  
 so as if *A.* having given Land

and to B. in taile, doth after (without  
 indenture which makes an Estoppel)  
 take a Lease to C. for xxj. years, and  
 when B. dyeth without issue during  
 the term, yet shall not the Lease take  
 effect, because it was utterly voyde  
 the first making. For estate tayle  
 being a state of inheritance may  
 be the intendment, and judge-  
 ment of Law have continuance  
 for ever, as appeares both by  
 the Case of *Adams* and *Lambert*,  
 where it is held within the Statute of  
 Chanceries which speakes of gifts to  
 have continuance for ever. There-  
 fore a reversion upon an estate tayle is  
 void, nor giveth cause of receipt,  
 otherwise in all these Cases it is tou-  
 ching a reversion expectant upon a  
 state for life. Againe it was said by  
 the defendants counsell that an estate  
 may be limited to A. and his heires  
 during the life of B. with remainder  
 to C. as in *Chudlies* Case was resolved:  
 but if Land be given to A. and his  
 heires, so long as B. shall have heires  
 males with remainder over to C. this  
 remainder is utterly void. So as there  
 is in the judgement of Law a great  
 diffe-

difference between the largenesse, and continuance of an estate taile, and of an estate for life. And if (which is worth the observing) a fee simple cannot afford a remainder to be drawn out of it after such a gift to one, and his heires during the continuance of an estate taile, or of the measure thereof; much lesse can a terme yeere such large thongs to be cut out of it as a remainder after an estate to one so long as he shall have heires of his body, or heires Males, which is all one. And in this case the remainder was held voyd by *Baldwin* and *Shelley*, though *Englefield* were of contrary opinion, as the Lord *Dyer* sheweth. Further it was said, that if such a conveyance by Will should stand good, it would raise a perpetuity not to be cut off, by any recovery.

28 H.8.Dy.f.7

But whereas the case of *Hamond* hath been related before, (so by way of admittance it was argued as a gift, and bequest to *Al. Ham.* and the heires Males of his body, with remainder in like manner to *Ralfe*. The truth of the case was, that the words of the Will, were only to *Alexander*, and his heires Males

Males (not speaking of his body) and  
 to *Ralfe*, which as was urged by the  
 defendants counsell, made the Case  
 stronger against the Plaintiffe: for  
 to admit that the former way *Alexander*  
 should have had but a state determi-  
 nable upon the continuance of his is-  
 sue Males, yet here not so. Since the  
 reason why in Wills, such a devise being  
 made, the Law should supply the  
 words (of the body) is only to make  
 an estate tayle to the issues Male ac-  
 cording to the Testators intent. Now  
 in this case of terme for years so be-  
 queathed, no estate tayle could possi-  
 bly be, though these words had been  
 in the Will; and therefore the mo-  
 tive to the Law sayling, no such sup-  
 ply will be made by the Law, since it  
 would be to no purpose: consequently  
 there was neither state tayle nor issues  
 to the heires Males of the body, on whose  
 continuance this state of *Alex.* should  
 be determinable Therefore it was an  
 absolute, and totall bequest of the  
 same to *Alexander* for ever, viz. so  
 long as the Terme should continue:  
 as a bequest to him, and his heires;  
 as a bequest to one and his heires, is  
 as



as much as if it had been to him for ever.

And this Case after six arguments on each side at the Barre ( if I much mistake not ) was upon argument by the Barons adjudged for the Defendant, by the Lord chiefe Baron *Tanfield*, and Master Baron *Bromley* Master Baron *Denham*, ( who onely heard, as I take it, one argument on each side, made of purpose in respect of his comming into his place after the former arguments ) being of the contrary opinion: and the judgement proceeded upon the point formerly touched, that as this case was, the state of *Alexander* did not end by his death, and remain to the Executors of *Ralph*. Other points were stirred which will be touched upon other divisions after in this Chapter. It will be observed that I doe more fully expresse reasons, and points inforced on the defendants part, then on the Plaintiffes, whereof let these two reasons be accepted. First, That I better could relate than the other, being the first who argued for the defendant, and hearing little of that which was by others

said

aid on either side after, nor hearing  
the Courts, *Nec ad hoc conductum, nec*  
*medibim fortis*. Secondly, the labour  
did lie on the defendants part to prove  
that this Case differed from the com-  
mon case of devise to one for life, with  
remainder to another.

We are now come to the sixth point,  
viz. that, where House or Land held  
by lease, or the profits thereof, or  
the lease or terme it selfe, which in a  
Will makes no difference, is bequea-  
thed to *A.* for life, or for some part of  
the term with the remainder to *B.* and  
the Executor assenteth that *A.* shall  
enjoy his bequest, whether this shall  
inure to *B.* also since without the  
Executors assent, no legacy can take  
effect. And it hath been resolved that  
his assent shall be effectually, as wel to  
all the remainders as to the first estate,  
and so according to former resoluti-  
ons, it was admitted in *Hamonds* case,  
that *Alexander* his assent to take as le-  
gatee sufficed (if the bequest had been  
good) for the remainders to *Ralse*,  
and others. And the reason of this  
doubtles is because here the particu-  
lar estate, and the remainder are all

*Plowd.* 545.6.

*Co. lib.* 1. c. f. 47.

but one estate in Law, they make but one degree in a Writ of Entre, nor shall have but one yeare and a day to enter for mortmaine; And an attornment to the grantee of a rent or reversion for life with remainder over, doth enure also to the remainder, which being an assent hath much affinity to that of the Executor, each tending to perfect the grant of another man. Now then whereas it was urged in *Hamonds Case*, that the state limited to *Ralse*, should take effect not as a remainder, but as a new estate to commence futurely, viz. when *Alexander* should be dead without issue male: if it should be admitted to be so, then could not the assent of the first state to *Alexander* have enured to this, since to a remainder it worketh as being one estate with the first, which reason must faile the other way. This difference between a remainder, and new estate future brings to my minde the case of a rent by way of new Creation granted by *C.* out of Land to *A.* for life or in taile with the remainder to *B.* in like manner: where it hath probably been held, although this limitation

cation to *B.* cannot be good by way of remainder, because *C.* had no estate in the rent remaining with him, when he made the grant to *A.* yet should it bee good by way of new grant, and creation to commence futurely. But this doubtles cannot so be but with a difference, for if the grant were by indenture between *C.* on the one part, & *A.* only on the other part, now *B.* being no party to the Deed can take nothing by it, except by way of remainder; but if he were party to the indenture, or, if the grant were by Deed poll to which all men are alike parties, then it happily may enure as a future grant to *B.* This not impertinent.

Now as the Executors assent to one cannot enure to another, though of the same thing, except by way of remainder, so neither can it any way where the things are not the same, except in very speciall cases; as if a termor bequeath a rent to *A.* and the Land selfe to *B.* the Executors assent that *A.* should have the rent, is no assent that *B.* should have the Land; yet I think that the assent that *B.* should have the Land, doth imply the assent that *A.*

*Plowd. Com.*  
521. In *Bret & Rigdens* case.  
So of common or other profit.

should have the rent. First, for that the restraint imposed by the Law, against the passing of a chattell by a Will without the Executors assent, being out of respect to the payment of the Testators debts : now if the Land shall passe to B, it is no more available to the Testators debts, that it passe discharged of the rent, than charged. Secondly, since the gift and bequest was of the Land charged with the rent, therefore if this bequest shall take effect it shall carry the Land according to the Testators intent, viz. with this charge upon it : for what else doth the Executor in this but assent that the Will of the Testator herein doe stand and take effect, and consequently B, must take the term according to the Will, and not in any different or contrary manner.

Next wee are to consider of the manner of assents by Executors, which hath some affinity with the fourth point : but here we shall consider only of assents conditionall ; now to this purpose we will cast our eyes upon two sorts of conditions, viz. precedent and subsequent. As for the former

mer, an Executor may to a legatee absolutely give assent upon a condition precedent, as thus. I am content, that if you can get and bring in to me such a bond wherein the Testator stood bound unto *I. S.* that then you enter upon the term, or take the Corn or Cattell to you bequeathed. So of other like conditions which may precede the assent, as if you can get the assent of my co-executor, or if you will pay the arrerages of rent to the lessor behind at the testators death, or if you will pay the wages already due to the servants attending about the Cattell or Corn to you bequeathed. In this Case, if the condition be not performed, there is no assent, and therefore the conditioning in this manner is good. But if it be upon a condition subsequent, as thus, I do agree, that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a creditor of the Testator, now the Legatee entering into or taking the thing bequeathed, shall not lose it againe by failing to perform the condition afterwards, for the Executor by his

assent cannot make that legacy conditionall which the Testator gave absolutely, no more than he can make that bequest to be absolute, which the Testator gave conditionally, except by a release made of the condition. As in other things, so in this the Executors assent is like to the attornment of a Lessee, which cannot be upon a condition subsequent, where the grant is absolute or without condition, though yet he may to his attornment prefix a condition precedent.

In the eighth place we are touching the bequest of Leases or Chattels reall, to consider what manner of interest one to whom a remainder of a Term after the death of another is limited, hath, and whether he may grant the same or dispose thereof during the life of the first. And as to that it is cleare that he hath but a possibility of remainder, for that possibly the whole Term may be spent in the life of the first, to whom during his or her life it is bequeathed; now a meer possibility is not grantable. Therefore was it resolved in the late Queens  
time,

time, where he in remainder granted  
 or sold his state or interest to another 99 *Eliz. Fulsey*  
 during the time of the first, that this *Case.*  
 grant was utterly void, because a pos-  
 sibility cannot be granted; but where-  
 as some opinion in that case was deli-  
 vered that this possibility could not  
 be released, no more than granted, it  
 hath since been resolved that he in the  
 remainder by his Deed of grant or re-  
 lease to the devisee for life may make  
 his estate, which before was determin-  
 able by his death to be now absolute,  
 so as it shall continue to his executors,  
 administrators, and assigns after his  
 death during the whole term. It may  
 be that what was conceived in the said  
 case of *Fulsey*, negatively of the vali-  
 dity of a release by him in the remain-  
 der, might be meant or perhaps ex-  
 pressed of a release to him in the re-  
 version; but surely me thinks though  
 he could not surrender, yet his release  
 or defeasance to him in reversion or  
 remainder having the freehold or in-  
 heritance, should dissolve or destroy  
 this term residue after the death of the  
 devisee for life, so as there the free-  
 hold should be discharged thereof.

*Lampets Case.*  
*Co. lib. 10. f. 48.*



But *Quæ.* for I have not known this in question. As for the other point of *Fulseys* case, it was in the said latter case of *Lampet* confirmed and admitted for good law, viz. that this possibility of remainder could not be aliened nor conveyed to a stranger.

Now we are come to the ninth point, viz. to examine whether any act of the devisee for life can frustrate or defeat him in the remainder of the term, and whether by the act of God, viz. the death of him in the remainder before the first devisee for life shall defeat it. As to the first, it hath divers times bin resolved, that no grant made by the first man, can cut off or defeat the second, though formerly it were held otherwise; but according to the latter resolution was it also held or admitted by all in the said case of *Hamond*, where was such a grant. And as this cannot be done by direct grant or alienation, no more can it by an indirect, or implied, as by taking of a new Lease, which is a surrender in law of the old Lease, no more then by an expresse surrender. Nor doubtles by outlawry, whereby the term of the

*Plow.* 520.  
*Welcden* and  
*Elkington*, 10.  
*El.D.* 77. 19  
*Eliz.D.* 359.  
*Cont.* 8. *El.D.*  
253. & 33 *H.* 8.  
*Bro. Chatelx.* 23.

the first devisee is settled in the crown.  
 But if we put the case further of waste  
 committed by the tenant for life, or  
 breach of condition by not payment  
 of the rent, or otherwise: these for the  
 whole in the latter case, and for the  
 part wasted in the former, doe so de-  
 stroy the lease, and put the reversion  
 in *Statu quo prius*, as that all re-  
 mainders must needs faile; so of a  
 forfeiture or other like forfeiture by  
 the tenant. As for the death of him in  
 remainder, it was urged in the case  
 of *Hamond*, that since it was but a  
 meer possibility, if it could not take  
 effect, and become an estate in the  
 life of him to whom it was limited, it  
 should not settle in his Executor; and  
 to that purpose were cited the case of  
 the Rector of Chedington, and more  
 expressly as resolved in the point, the  
 case of *Price & Atmore*. But the Court  
 resolved (& found former resolutions  
 of other courts that way) that the death  
 of him in the remainder did not hin-  
 der, but that it may settle as well, in his  
 Executors upon the death of the  
 devisee, as it should have done in him-  
 selfe, if he had overlived the first de-  
 visee

*Wellden and*  
*Elk. ubi supra.*  
 But therethe  
 point was never  
 questioned,  
 though such  
 death was  
 there.

visée for life. If the Lessor enter and levie a fine, and the Devisee for life enters not, nor claimes in five years, he in the remainder may enter, as having a right futurely accrued.

In the last place, wee intermedled only with Leases bequeathed, wherein yet is to be understood, that what thereof is spoken, is to be extended to, and understood of all other chartells reall, as wardship of body and Lands, estates by extent upon Statutes or Judgements, termes otherwise then by lease, in faires, markets, rents, annuities, commons, advowsons, and other profits; yea, one single next avoidance of a Church. Now we come to consider of bequests personall, principally, if not onely, viz. how such may be forfeited, lost, or revoked. First then, we will consider of the acts of the Legatee; secondly of the acts of God; thirdly, of the acts of the Testator. The Legatee, as from the Civilians I learne, may forfeit his Legacie by his mis-carriage towards the Will: as if hee use means to have it concealed and kept from being known, and consequently pro-

Of forfeiture,  
revocation and  
other losse of  
Legacie.

*Swin. de re-  
stam. 352, 353.*

oved. So if hee accuse it of falsity. Except as tu-  
 againe, if he deface or destroy the tor or guardi-  
 will. Also, if being by the Will ap- an he accuse it.  
 inted to be Tutor or Educator of a  
 hilde, he refuseth so to be; so saith  
*Swinborne*: but *Silvester Prierius* *Sum. Silu. 284.*  
 ms to me opposite in that where  
 saith, *Si legatum fuerit aliquid ea*  
*conditione ut facias aliquid, tale legatum*  
*est conditionale, sed modale*; so as he  
 kes away the force of a Condition  
 om words conditionall, whereas the  
 her without words conditionall  
 iseth a Condition implied. Lastly,  
 the Legatee presume too farre upon  
 the strength of the bequest to him, so  
 hee taketh the thing bequeathed  
 outhout the consent of the Executor;  
 us also doth he forfeit his Legacie,  
 ith Mr. *Swinborne*, unlessse the Te- *De testam. 252.*  
 ator did will and appoint he should  
 doe. The falling into enmitie  
 ith the Testator, will be considered  
 more fitly, as I take it, among the  
 ts of the Testator. In the next place  
 us see what acts of God shall cause  
 Legacie not to take effect, first thus:  
 the Legatee die before the Testa-  
 or, this legacie is lost, and his Exe-  
 cutor

*De testam.* 255.

*Vide Bro. De-*  
*visé* 27. & 45.

there were di-  
vers dayes of  
payment, and  
the Devisee  
died before the  
last; his Exec.  
shall have it.

14. *vel.* 24. H. 8.

36. H. 1. & 3 E.

Dy. 59. See this  
difference.

*Sum. Silc.* 283.

According

hereto; *vide*

*Dy. ubi supra,*

*per majorem*

*opinionem Ju-*

*sticiar.*

cutor shall not have it : So also saith  
Master *Swinborne*, if it be appointed  
to be paid after the death of the Ex-  
ecutor, and the Legatee dieth before  
the Executor, it is lost; and so also  
if he die before the condition perform-  
ed, saith he. Let us come now to the  
time of payment, and death before it.  
If there be a day certaine, limited for  
payment, and the Legatee die before  
that day, his Executor shall have the  
Legacie; contrariwise, if the payment  
were limited to be made when the  
Legatee should be married : but if the  
will were only expressed to be toward  
the marriage of the Legatee, and she  
die before marriage, her Executors  
shall have it, saith *Swinborne*.  
Now put the case, that a Legacie be  
bequeathed to B. to be paid when he  
shall be five and twenty yeers old, and  
B. dyeth before that age, it shall not  
be paid to the Executor, and that pre-  
sently, without staying till B should  
have been of that age, saith *Prier. Nay*.  
saith *Swinborne*, if the words of the  
Will be so, *viz.* when he shall come  
to such an age, then if he die before  
his Executors shall not have it at all  
but

if the bequest be generall, and further it is added in the Will, that the Executor would have that Legacie to the Legatee at such an age; there, though he die before such age, yet his Executors shall have the summe bequeathed. The difference may seem very nice, yet happily it wants but some probable colour of reason.

Now lastly, Let us come to the Testator's owne act, who cleerly hath power to revoke or countermand any legacie, though he revoke not the Will; and here first of revocation presumed. If there fall out *leves inimicitie inter legantem & legatum*, *legatum caducum efficitur*, saith Summilt; *Sed non propter leves*, saith *& si graves si tamen redeant ad amicitiam, reintegratur legatum*, that is, by removing enmitie after a rising, and ever reconciled betweene the Testator and Legatee, the Legacie is dissolved, otherwise of a light breach, or falling out, though it continue untill the death of the Testator. This I conceived to be rather fit for this place, as an Act of the Testator, then to be recko-

Acts of the  
Testator.

Sum. Silic. 286.

reckoned or registred among the acts  
or forfeitures of the Legatee, for that  
it is not by the Summist made material  
all, or any point of difference, whether  
the Legatee gave just cause of offence  
or that the Testator unjustly conceived  
displeasure, and so grew into  
causelesse enmity. Therefore also  
doe I hold it of the nature of a revoca-  
tion implied or presumed; for that  
although no revocation be made, yet  
since the Testator hath ceased to bear  
good will to the Legatee, hee cannot  
be intended to will him good, nor  
consequently to be of the same mind  
touching the benefiting of him, as he  
was when he made his Will: Yet here  
again it is worth the consideration  
whether the circumstance following  
may not make a difference in the Case  
thus; that where the Testator died  
shortly after the breach and enmity  
growne, and before he came to the  
place where his Will is, or at least to  
opportunity of perusing and reform-  
ing the same: There this very altera-  
tion of affection, should make an altera-  
tion in the Will, and a revocation  
of the amicable bequest. But where

living a good space after, and coming to the place where his Will was, and specially if he doe again perceive it, and yet doth not crosse nor expunge that bequest, here it may be presumed, that either his enmity ceased, or that so farre as to continue this bequest, the charity or other motives inducing him to make it, stood unconquished, and not extinguished by his breach of former amity. For as the continuance of time and opportunity after the making of a verball or uncupative Will, without reducing it to writings and causing it to be attested by witnesses, though the Testator live divers yeeres after, doth strongly argue his intent not to continue, that what was done in an extremity should stand as his Will: so on the contrary, the permitting of a bequest expressed in a written Will, to continue without any crossing, blotting, or defacing, may argue against contrary presumption, the Testators minde, that it should continue as part of his Will. But now let us consider of more expresse Revocation, and to that purpose will I relate a late



late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Master of the Rolls, three Judges, and two Doctors, Masters of the Court; Betweene *Robert Eyre* and *William Eyre* complainants and *Hester*, late wife of *Christopher Eyre* their brother, and now Wife of *Sir Francis Wortley* Defendant; This was the Case. The said *Christopher Eyre*, 15. *Jacobi*, by his last Will and Testament, giveth and bequeatheth to the said *Robert Eyre* his brother, a hundred pounds, and to the said *William* his brother a thousand pounds, and giveth to the said *Hester* his Wife all the residue of his estate, and maketh and ordaines the said *Hester* his sole and only Executrix, saving for the only performance of his Will, ordaineth *Robert Eyre* and *William Eyre*, his said brothers, whom he intreats to joyne as Executors in trust with his Wife for the better performance of this his last Will. Afterwards, 5. *Jan.* 1624 being sick of the Sicknesse, whereof he died, he was moved by Master *Darby*, *port*, and Master *Stone*, to settle his estate; to which motion hee yeelded

and M. Stone and M. Dampport did demand of the said Christopher, what friend he thought fittest to be his Executor, and to whom hee would commit the care of discharging his funerals, and performing his Will, whether he trusted any person more than his wife, to be his Executor? To whom he answered, That his Wife was the fittest person for that purpose, and therefore should be his sole Executrix, and then the Testator was moved by M. Stone, to give, and bequeath Legacies to his Father, and to his Brethren, and to his kindred, Whereunto he answered, Hee would give or leave them nothing, and being further put in minde to remember his friends and others, gave and bequeathed to *Lionell Atwood* his God-child, 20 or 30<sup>s</sup>. and being thereupon moved by his Wife, to give his said God-daughter more, or a greater Legacie, or the like in effect; said, Thou knowest not what thou dost, doe not wrong thy selfe, Twenty or Thirty shillings money in a poore bodies purse, or the like in effect, and the rest, he left them to his wives discretion or disposition,

sition, and the said Testator did speak the words aforesaid, or the like in effect, *Animo testandi & ultimam voluntat. declarandi*, as the witnesses then present did conceive.

Ord. 27. Jun.  
a. 3. Caroli re-  
gis.

This Will was proved by the oath of the said *Hester*, and this *Codicell* being pleaded, as a revocation of the said bequests, The said Master of the Rolles, Judges, and Doctors, were by the Lord Keeper, and the order of the Court, desired to reduce the matter upon the Will, and *Codicell* into a Case, and to certify their opinions, whether the said *Codicell* were a Revocation of the Legacies given to the Plaintiffes or not. And they after counsell heard at severall times. viz. both Common Lawyers, and Civililians, and many howers spent in conference together, did finally resolve with one unanimous consent, That the Legacies to the Plaintiffes given, were not by the said *Codicell* revoked, and so certified under their hands, upon reading whereof 25. November. Decree being resolved to be made if case were not shewed to the contrary. 27 November. on which day the

the defendants counsell before the  
 Lord Keeper, in the presence of the  
 Master of the Rolles: and the said  
 three Judges, and Sir *John Heyward*  
 leading what they could in stay  
 of the said decree; It was by a gene-  
 ral concurrence of opinion decreed,  
 that the legacies given to the said  
 Plaintiffs, should be to them payd on  
 the *Lady-eves* with 20. Nobles in the  
 hundred for the detainment thereof.  
 In this case I thought fit to relate some-  
 what at large, because it pitcheth  
 upon the point of revocation with-  
 out plaine, full, and expresse termes.  
 And surely as Wills are to be made  
 out of disposing memories and un-  
 derstandings, so also with deliberate  
 and advised judgements; and there-  
 fore by like reason not to be counter-  
 manded or revoked by sicke or slight  
 impressions. And this seemes to me  
 very agreeable with the rule and rea-  
 son of the common Law. For as rea-  
 son it self doth dictate, that *Nihil tam*  
*essentaneū est æquitati naturali, quam*  
*semperquodque dissolvi eodem modo quo*  
*constituitur*; So hath the common Law  
 of England, in my understanding, re-

solved. As for the purpose; if the King present a Clarke to a Church, and he is thereupon admitted, and instituted thereunto: Now yet before induction may this be revoked as Will may. Yet if the King shall after and before induction, present another man to this Church, without an expresse repeale or countermand of the former presentation, it shall not hereby be revoked. So if Lands were conveyed to certaine uses, with clause or power of revocation; the sale of the same to another did not revoke the former. But if a state were merely at will, then the conveyance to another, by the common Law, amounted to a revocation. Therefore was the Statute made *temp. Henrici* to redresse this, *viz.* That where the King had granted lands, or other things to one during his pleasure, this should not be revoked by a grant to another, without recitall of the former, and declaration that the King had determined his pleasure.

To helpe this  
was the Statute  
made 27. *Eliz.*  
*cap. 4.*

6. H. 8. *cap. 9.*

Being now to consider of relation in the Executors assent; it is meet that since these discourses are principally

fully intended for those who are not  
 grounded Students in, or professors  
 of the Law, that we shew what we  
 mean by Relation, or what it is in  
 Law. Thus therefore be it conceived;  
 that Relation is a kinde of fiction in  
 Law, making a thing done at one  
 time to be accepted, & reputed, or to  
 have its operation as if it had beene  
 done at another time past. As for the  
 purpose: *A.* doth bargain, and sell  
 his hold lands to *B.* in *August* by  
 indenture, which is not inrolled un-  
 til *October* following; yet this hath  
 such relation to the date of the In-  
 denture, that if *A.* after that, and  
 before the inrollement, become  
 bound in a Statute, or granted a rent  
 charge, or made a lease for yeeres, or  
 took a wife, or committed felony;  
 yet shall none of these be of any force  
 to charge or prejudice the state of *B.*  
 so that the Law adjudgeth him now  
 owner by Relation, as from the time  
 of the date: yea, if a servant departing  
 in *August* for some great breach with  
 his master, doe kill his master in *Octo-*  
 ber, this is in Law petty treason, as if  
 he had continued servant when he

did the fact, because it relates to the malice conceived when he was his servant. Now then having shewed that a term, or other chattell reall or personall, passeth not, nor is transferred in property to the devisee untill the assent of the Executor be thereunto had: We now put the case, that this assent is not had till a yeere, or some such good space after the Testators death, and make our question, Whether this shall have relation to the Testators death, *viz.* to be in the Lawes account as if it had then been, or perhaps to some purposes so to stand, and to others not so? That this is usefull, and materiall to be knowne, be it thus shewed: One bequeatheth his terme of Tithes of an advowson of an house or land by him first leased to an undertenant for rent, and dyeth in *May*, the Executor assenteth to the bequest in *October*; between which two times tithes be set out, the Church becomes voyd, rent groweth payable: now if this assent shall relate to the Testators death, the Devisee shall have these, else not: The like cases may be put of the

the brood of Cowes, Mares, and  
 ewes, fallen between the death of the  
 Testator, and the assent; So also of  
 fleeces of Sheepe shorne, &c. Now  
 come to the point: It is reported  
 by the Lord *Cooke*, to have been held  
 in the late Queenes time, That this  
 assent shall, as between the Executor  
 and the Legatee, have relation to the  
 Testators death; yet so, that if the E-  
 xecutor before his assent to the Devi-  
 see of a lease, committed waste; now  
 the action of waste shall be brought  
 against the Executor, in the *Tenuit*,  
 for the waste done before, and not a-  
 gainst the Devisee in the *Tenet*. But  
 in the case that the Legatee, before  
 the Executors assent, granted the term  
 to *I. S.* now if to any purpose this as-  
 sent shall have relation, it shall cer-  
 tainly so be to make good this grant,  
 as making the Legatee to be estated,  
 and consequently able to grant be-  
 fore the Executors assent; yet doe I  
 not finde any opinion or resolution  
 in the Point, but finde it debated at  
 the Barre in the late Queenes time  
 betweene *Puckering* and *Egerton*, in  
 the case of administration granted to

*Tr. 41. Eliz.*

*Co. lib. 5. f. 12.*

*B. Sanders case.*

*Vide Plow. com.*

of an action of  
 tresp. against a  
 stranger for ta-  
 king before as-  
 sent, 280. *N.*

*P. 25. Eliz.*



41.E 3.15.

A. after her grant a free terme, left by her intestate husband: but I finde no resolution therein, nor perhaps wants there materiall difference betwixt that case and the other: for there the Devisee had at least an inception of title by gift of the owner, wanting only a circumstance of assent to perfect it: but here this woman till administration had not so; unlesse perhaps the Statute 21. of Henry the 8<sup>th</sup>. directing or enjoining Ordinaries to grant administration, shall amount to a kinde of title, *ad rem*, though not yet *in re*. But to returne to point of Assets; where a reversion is granted by Deed or Fine, if the lessee a good time after doe attorne, this shall have no relation to the time of the grant; So as for waste committed, or rent grown due between the grant and the attornment, the Grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the assent of the Executor, before the sale or gift well testified; or if the assent be not had till after, let him take a new gift, that he may not rest in a doubt-  
full

by all case: for besides the premisses that  
 great Legist, Sir *Edward Cooke* when  
 he was a practiser to Master *Stubbes* of  
*Norfolke* for his Sea, gave his opinion  
 that I have been confidently informed,  
 that where a lessee, for years, being  
 outlawed did grant his term, and af-  
 ter reversed the outlawry, this did  
 not make good the grant by relation,  
 it not being in the grantor at the time  
 of his grant; and this hath much affi-  
 nity with the principall point, for  
 where if the relation help not, the  
 grant is not good from the Le-  
 gatee.

*Divers cases of bequests considered,  
 and expounded.*

IF a termor of an House, bequeath  
 this House to *B.* without expressing  
 how long he should have it, he shall  
 have the whole term, and number of  
 years. So of land.

Also by the name of the House, the  
 Orchards, Gardens, and Backsides  
 doe passe: yea if the House with the  
 appurtenances be bequeathed there-  
 by, the lands belonging to the House  
 or

19. *Elix. D. 307*  
*conte. in a grant*  
 31 *Elix.*

*Sum. Silv.* 286.

or used with it doe passe, though ye they would not so doe, by such word in any Lease, Deed, or Grant, yet by some Civilians or Canonists, the Orchard belonging to an House shall not passe by the onely gift of the House without some words, shewing the intent of the Testator so to be; or except one gate or doore leade as well to the Orchard, as to the house: but some other of them hold that it doth passe without any such helpe of circumstance, so as it be adjoyning to the House.

*Ibid. ut supra.*

If a Lessee for years give his term by his Will to *A.* he shall have it without paying any rent, for the Executors shall pay it for him, as I finde in the Summist, but against reason me thinks.

*Ibid. ut supra.*

If one bequeath his indenture of Lease, his whole state in that Lease passeth. So if one bequeath his Obligation or other specialty, the debtor duty it selfe shall goe to the Legatee; and by the Canon or Civil law, the very action it selfe passeth, viz. as I conceive, ability to sue the debtor in his own name; but in our law it is otherwise.

otherwise; the suit must be in the executor's name: for a debt or thing in action cannot be assigned except by or to the King, and only at the common law is the debt recoverable; but the spirituall Court may force the Executor to sue or let his name be used in the suit for and by the legatee.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corn, nor fruit growing on the ground, nor stone, nor timber prepared for building, as the Canonists and Civilians hold.

On the other side, if one bequeath the moiety of all his goods, the Legatee shall have onely the moiety of that which remaines after debts payed, for that onely is to be accounted the Testators which he hath *ultra as alienum*.

By a bequest of all utensils or householdstuffs, plate nor jewels are not given.

If one bequeath to his wife all her apparell, she shall not have as some Civilians say, her ornaments of gold or silver, by which is meant as Itake it, Chaines,

Yet 48 E 3.13,  
It is admitted  
that such a devisee of all  
goods after  
debt paid, shall  
have a duty resting in account.

Que.  
36 H. 8. Dy. 59.  
Dy. ib. supra.

Sum. Silv. 286.

Chaines, Jewels, Bracelets, Rings, &c. but others are of contrary opinion, except they be such things as are not lawfull for her to weare.

*Ibid.*

If a Bed be given by a Will, *Veni ornamentum ejus*, saith the Civilian, that is, the furniture thereof passeth, viz. not only the bed, bedstead, bedcloaths, but also the curtains and valents, as I take it. But I think that by gift of a Coach by Will, the Coach horses passe not, yet perhaps the furniture of the Coach horses may passe as appertenant to the Coach, for so I think they shall doe, rather then by bequest of the Coach horses without the Coach.

*Ibid.*

If one bequeath to *A.* meat, drink, and clothing, or *alimenta*, he shall have, saith the Civill Law, also lodging, habitation, and all things necessary for the maintenance of life, viz. as I take it, fire and washing, &c.

*Ibid. b.*

If one bequeath to his Daughter ten pounds a year for her apparreling and she demandeth none in foure years, now shall she not after that time have the arrerages of this ten pounds by yeare for the time passed.

If

§ 1. If a man bequeath one of his horses *Ibid.*  
or cowes, not naming which, to *A. S.*  
it is to choose which he will, so it be  
to the best of all, saith the Civill law,  
and perhaps the mention of that ex-  
ception grows out of respect to the  
prior, which the Lord should have,  
or the mortuary which the Parson  
should have.

§ 2. A man bequeathes thirty pieces of *Ibid.*  
twenty shillings to *A.* twenty to *B.* and  
ten to *C.* to be had in such a Chest or  
Casket, and it is found after his death,  
that there be but thirty in all in that  
Casket or Box, now each shall be a-  
parted ratably, saith my Summist, so  
that *A.* shall have fifteen, *B.* ten, and *C.*  
five, and this stands with good reason  
and justice, for so each hath a propor-  
tionable part. And it were reasona-  
ble, that it were by Parliament establi-  
shed for law; that all, both Legatees  
and creditors should be payed in like  
proportion, where the state will not  
suffice for full payment of each, rather  
then that an Executor should have  
power to pay one all and another no-  
thing, yet if the Testator left suffici-  
ent to make good all those sixty pieces  
be-

queathed *Que.* if that which is wanting in the Casket shall not be supplied and made up, for if the cases following found with the same author be good Law, it should seem so to be.

*Sum. Silv.* 286.

If one, saith he, bequeath to *I. S.* that which is another mans, & whereto the Testator hath no right, then ought his Executor to buy it, and give it to the Legatee, or else satisfie him to the full value, and this not onely by the Civill, but also by the Canon law, and in *fore conscientie*, saith my Author.

*Ibid.* 287.

Againe, if *A.* bequeath to *B.* such an horse by name, and after sels away that horse, and dyeth, now is his Executor bound to answer the value thereof to *B.* and if the Testator after his sale of that horse had bought another, and called him by the same name as the first, now shall this latter horse passe to *B.* saith the booke, except it can be proved that the Testator sold the former horse of purpose to revoke his Will touching that bequest.

So againe finde I, That if one having but a moyety or one halfe of a

Green

green close, or of a stack of Corne, or  
 her chattell, doth give the whole,  
 as the words be apparent to reach to  
 more than his moyety; then must the *Ibid. 286.*  
 executor buy out the others part for  
 the legatee, or give him the value:  
 if the words be but generall, so  
 they may be reasonably satisfied  
 with the Testators part, no supply  
 shall be made. So also if one having  
 goods in pledge, bequeath them; it  
 shall be contrued to extend no fur-  
 ther than his right.

A bequest is made of an hundred *Ibid. 284.*  
 pounds to be payed at a future time,  
 viz. divers yeares after the Testators  
 death: A question is made by the  
 jurists, whether the profit of the  
 money in the mean time shall goe to  
 the legatee, or the Executor? And  
 resolves with this difference: If the  
 money were given in favour of the lega-  
 tee, being an Infant, who could not  
 fully receive it any sooner, then he  
 shall have the profit; but if the respire  
 of payment were in favour of the E-  
 xecutor, then shall the legatee have  
 but the bare summe without any ad-  
 dition of meane profits.

If



15. Eliz. Dyer  
331.

Plow. Com.  
545. b.

Co. lib. 8. 96. a.

If one bequeath all his terme goods to his Executor for payment of his debts, or debts & legacies, it is a void bequest, because it is no more than the Law would say, if he had said nothing. So if it be generally performe his Will.

If one seised in Fee-simple of Land bequeath it to his Executor, to pay debts, the Executor hath no state of Freehold; for if he should, then it must be either for life, which might end by his quick death, before debts payed, or in fee-simple, which would carry away the land for ever from the heire where perhaps a few yeeres profit might suffice to satisfie the debts; yet then by the death of the Executor, the Land should discend to his heire, and not goe to his Executor, who would be Executor of the first Testator.

By Deed or word in life.  
4. E. 6. Bro. Done, &c 43.  
Tr. 37. Eliz. in ba. reg. Portm.  
ver. Simmes, or Willis. divers times argued.

If one give or grant all his goods having leases for yeers, as well as moveables, the Leases shall not passe as was held in the time of Ed. the 6. And so also was it admitted in Portmans case, for the word *bona comprehendeth* onely moveables, by the better opinion there. But the point

that case was pertinent to this  
 place, viz. a bequest in a Will, of all  
 the Testators goods, and whether  
 hereby a Lease for yeeres passeth or  
 not, was divers times debated, but not  
 resolved, the Judges differing in opi-  
 nion in that point; but in another  
 point, which made an end of the case,  
 all agreed. Yet the better opinion  
 was, as I finde in my report, that a  
 lease would passe by such words in a  
 Will, though not in a Deed, or grant  
 by word; otherwise made, for that  
 legacies are demandable in the Spi-  
 ritual Court, where *bona & catalla*.  
 are taken for all one. See also the  
 case of *Marlbr.* giving an Action to  
 the successor *ad repetenda bona prede-*  
*cessoris*. Yet an *eject. custod.* hath  
 been maintained thereupon: so also  
 upon the Statute for Executors, *de*  
*bonis asportatis in vita testatoris*, hath it  
 been resolved, and where Admini-  
 stration is granted, it is only *omnium*  
*bonorum*, without speaking of chat-  
 tels, yet hath the Administrator in-  
 terest in leases, as well as moveables.  
 On the other side the *Stat. de prerog.*  
 mentioning only forfeiture *de ca-*

Cap. 28.

4 E. 3. cap. 7.

So the Stat. 5.

R. 2. ca. of forf.

of goods by  
 those who goe  
 beyond the  
 Sea.

cap. 16.

Cc

tallis,

In all these  
goods are  
comprehended

13 H.7. *Kelw.*  
*rep.* 35. a.

*tallis*, is cleerely extended to moveables, so also in the Writ of *Affize de catallis que in eo capta fuerint*, and in the Writ of Execution upon a Statute, there is only the word *catalla* and not *bona*, and in the Case reported by *Kelway temp. Hen.* the Seventh it seems *bona & catalla* were taken for *Synonyma*, or all one. It doth not appeare that these Statutes and Writs were alledged or considered of *temp. Ed. 6.* but in *Portmans Case* the most of them were.

If one Will that his wife, or any other shall have or hold, or enjoy the moiety of his Lease with his Executor. This implyeth not that the Executor have the other moiety as a Legacy also, but otherwise, as the law casts it upon him, no more then where the moiety of fee-simple land is devised to the younger sonne, this shall not make the elder sonne to have the other moiety otherwise then by descent, as between *Low* and *Charters* was conceived. But there being a Proviso in the wives bequest, that if she married from the house, then &c. *Popham. cap.* Justice held, that if she

*Low & Carters*  
*case. Tr.* 37.  
*Eliz. in ba. reg.*

mar-

married at all, this was a marrying from the house, for she was no longer widdow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed.



## C H A P. XX.

*Of the Executor of an Executor.*

Should be taxed of omission, if I should not shew whether the things fore-spoken of Executors immediate, extend al-

so to the mediate or more remote Executors. Assuredly, were I not by the bookes otherwise informed, I should thinke it somewhat strange, that the mediate Executor, in the Fourth, fifth or further degree, should not by the rules of the Common Law, stand in like plight Executor to the first

See Plow. 184.  
a Debt against  
the Executor  
of an Execu-  
tor.

19. *Ed. 2. & 14.*  
*Ed. 3. Fitzh.*  
 Executor 87.  
 & 103.

11 *Ed. 3. & 13.*  
*Ed. 3. Fitzh.*  
 Ex 78.92.  
 25 *Ed. 3. cap. 5.*

Testator, as the first and immediate Executor, as well as the heire, and Assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate heire, and Assignee. And indeed we finde both in the the time of *Edward* the 2. and *Edward* the 3. Execution sued out upon a judgement, and Statute by an Executor of an Executor, and why he might not as well maintaine an action of debt, &c. I see not. But I must confesse, I finde both bookes to the contrary, before any Statute made in the point, and after an Acte of Parliament to enable them to bring Actions, and to make them subject to actions, yet the Statute speaks nothing of conferring upon them the Testators goods. Now if they had title to them before that Statute, and without the helpe of that Statute, it is strange they should not be suable for debts. But since that Statute, and at this day, where by a Will a speciall trust is recommended to an Execut<sup>r</sup>, as to sell land, &c. This not performed in his life time, shall not be performable by his Executor,

contrariwise of an interest, as to take the profits of lands for certaine yeers towards payment of debts, and Legacies: and where the Statute *temp. H. 8.* gives remedy to Executors for recovery of rents of inheritance behinde the Testators life, I doubt not but Executors of Executors, are within the equitie, as well as within the Stat. *Ed. 3. cap. 3.* that the Executor who appears at the grand Distresse, shall answer alone. Yet the Stat. *West. 2. cap. 23.* for Executors, was taken not to extend to Executors of Executors. *Quod non est lex.* So as now in all cases except of speciall trust or authority, without the Office of Executorship, The Executor of an Executor, how farre soever in degree remote, stands as to the points, both of being, having, and doing, in the same state and plight, as the first and immediate Executor.

19 H. 8. 9, 10.

4. El. Dy. 210.

32 H. 8. cap. 37.

So 32. H. 8. 28.

leases.

And 32. H. 8.

cap. 34. Condi-

tions, &amp; 13 El.

cap. 5. &amp; 27.

Eliz. cap. 4. Of

fraudulent

conveyances.

21. H. 8. cap. 15

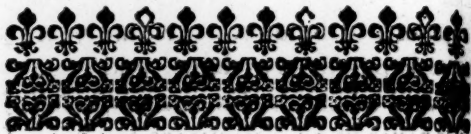
for falsifying

recoveries.

39 H. 6. 45.

7 E. 3. 62.

42



## CHAP. XXI.

*Touching Administrators.*

OF these also, as standing in much affinity with Executors, it may be by some expected, that I should have treated. But first my excuse is, that these of Executors only having growne to so great a bulke above expectation, I was unwilling to enlarge it further. Secondly, that which in the points of having, and doing, is before set forth, and shewed touching Executors, may be applyed to, and understood of Administrators, though not what is spoken of being, and unbeing, or Revocation of Executorships, and other circumstantiall points.

Last.

Lastly, I may perhaps, if these  
inde good acceptance, adde ere long  
that which appertaineth to Admini-  
trators distinguished from Execu-  
tors, or wherein they stand in diffe-  
rent state.



## CHAP. XXII.

*Considerations in conscience touching  
payment of Debts, Legacies, and  
the preferring or respect of Per-  
sons.*



O the advertisement  
what course Execu-  
tors are to hold in  
their payments, I  
thought good to adde  
this *in foro conscientia*.

That when as it shall stand in the Ex-  
ecutors Will and Election to pay  
whom he will, and as he will, in re-  
spect of equality in the dignitie and



degree of the debts, all being for the purpose by Specialty, and none of record, and yet he hath not wherewith to pay or satisfie all; Here hee may have three wayes or courses in his eye.

1. Where there is equality in the honesty and conscience of the debts; there except in the ability of the parties to beare losse, the disproportion may otherwise occasion; me thinks it should be most honest and just, to pay every one proportionably, and to let the losse of every one to be equall: and the justnesse of this is taught by the law, which gives the *audita querela* for equall contribution in bearing of losse by them who stand in equall degree: so of Legacies.

2. The poverty and inability of some, and the plenty of others, may in *foro conscientie*, justifie the paying more to one, and suffering him to lose lesse (if any thing) then another. For as the widowes mite was a greater gift, so a greater losse then more out of abundance. Where charity findes, or may finde place, or neerenesse to place

place of giving, it may finde greater motives of preserving from losse : So of Legacies.

The nature of the debts, and so sometime of Legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one then another, rate for rate, and so to suffer one to lose more then another. One debt may perhaps be use for money, or at least money lent for use, another may be money freely lent. Another debt for Land of inheritance bought; another debt for a Lease, chattells, or moveables come to the Executor : The first merits the least respect, next the second, then the third, and the last the most. But where without any of these motives, there is no equality held in payment, *Peccatur* ( as I thinke ) *in conscientiam*. But let every one stand or fall, by, or to his owne, or to him who is greater than his conscience. This equality Saint Paul in another case recommends to the *Corinthians*. And *Solomon*, whi- 2 Cor. 8.v.14. lest no inequality appeared in the point of right, shewed his disposition

*The Office of*

on to have made an equall division of  
the childe between the mothers, who  
were joynt claymers, and competi-  
tors for it.

See more of Conscience, *Doct.*

& *Stud.*



THE



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The whole of this will not grant. Others of administering.  
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